



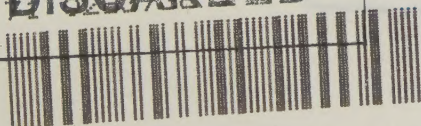
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# THE LAW REPORTS

[1906] 2 King's Bench

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1906.

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THE  
LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

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KING'S BENCH DIVISION  
AND ON APPEAL THEREFROM IN THE  
COURT OF APPEAL,  
DECISIONS ON  
CROWN CASES RESERVED  
AND DECISIONS OF THE  
RAILWAY AND CANAL COMMISSION.

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1908

# LAW REPORTS

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OF  
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1906.

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JUDGES  
OF  
THE KING'S BENCH DIVISION  
OF  
THE HIGH COURT OF JUSTICE.  
1906.

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# ERRATA AND ADDENDA.

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721	„ (1)	9 C. P.	L. R. 9 C. P.



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# CASES

DETERMINED BY THE

## KING'S BENCH DIVISION

OF THE

## HIGH COURT OF JUSTICE

AND BY THE

## COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

## COURT FOR CROWN CASES RESERVED

AND BY THE

## RAILWAY AND CANAL COMMISSION.

### ELWES v. HOPKINS.

*Motor Car—Driving at Speed dangerous to Public—Hearing regard to all the circumstances of the case—Appeal to Quarter Sessions—Evidence—Traffic—What might reasonably be expected to be on the Highway—Motor Car Act 1903 (3 Edw. 7, c. 36), s. 1, sub-s. 1.*

1906

April 26.

The driver of a motor car was convicted before justices under s. 1, sub-s. 1, of the Motor Car Act 1903, of driving the car on a certain public highway "at a speed which was dangerous to the public having regard to all the circumstances of the case." At the hearing of an appeal to the quarter sessions evidence was given by the respondent as to the traffic which might reasonably be expected to be on the highway although the admission of any evidence as to hypothetical traffic was objected to by the appellant—

Held that the evidence was properly admitted.

Cases stated by the chairman of the Gloucestershire Quarter Sessions.

The appellant had been convicted at Cheltenham Petty Sessions "for that he on March 17, 1905, at Cheltenham . . .

1906  
 ELWES  
 v.  
 HOPKINS.

did drive a motor car on a public highway there situate at a speed which was dangerous to the public having regard to all the circumstances of the case contrary to the statute in such case made and provided," and he was adjudged to pay a fine of 2*l*. From that conviction the appellant appealed to quarter sessions. At the hearing of the appeal the following facts were proved :—

That the appellant drove a motor car along the highway known as the Promenade, Cheltenham, at 4 o'clock in the afternoon at a very fast speed, witnesses for the prosecution alleging that the car was going from "twenty to twenty-five miles an hour," "twenty miles an hour or over," "considerably over twenty miles an hour." The appellant admitted that twenty miles an hour would be too fast a rate at which to drive a car down the Promenade, but he alleged that he was not going more than fifteen miles an hour; that at the time of the alleged offence there was little vehicular traffic in the carriage-way of the Promenade; that no person was in fact in danger owing to the driving of the motor car by the appellant; that the Promenade was more used than any highway in Cheltenham; and that the small amount of traffic at the time of the commission of the alleged offence was unusual.

The Court of quarter sessions held as a fact that at the time in question the appellant was driving at a speed which was dangerous to the public having regard to all the circumstances of the case. The Court came to that conclusion from the evidence given by various witnesses who spoke to the pace at which the motor car was being driven, the traffic that was usually in the Promenade at the time of day when the offence was committed, and as to the difficulty when in the Promenade of seeing the approach of traffic from the many side streets leading into the Promenade.

The admission of evidence of hypothetical traffic, namely, the traffic which might reasonably be expected to be on the highway, was objected to by counsel for the appellant on the ground that the words in s. 1, sub-s. 1, of the Motor Car Act, 1903, "and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway" (1), were

(1) By s. 1, sub-s. 1, of the Motor Car Act, 1903: "If any person drives a motor car on a public highway recklessly or negligently, or at



not inserted in the conviction, and that the appeal was against the conviction as provided by s. 11 of the Motor Car Act, 1903. (1) The Court of quarter sessions overruled the objection, but stated the present case.

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ELWES  
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HOPKINS.

The question for the opinion of the Court was whether, having regard to the form of conviction, the evidence as to the amount of traffic which might reasonably be expected to be on the Promenade at the time of the commission of the offence should have been excluded.

*A. Moresby White*, for the appellant. The evidence was not admissible. Convictions in summary proceedings must be construed strictly: see *Paley on Summary Convictions*, 8th ed. p. 203. In this case the conviction as drawn up must be taken to state the whole offence proved: see the observations of Wills J. in *Smith v. Moody* (2), and, as nothing appears in the conviction about hypothetical traffic, evidence at quarter sessions on that point was inadmissible. To admit it would be to give an undue extension to the conviction; besides, it was unfair to the appellant, who only came prepared to meet the case stated in the conviction, namely, as to the offence he was alleged to have committed having regard to the actual traffic on the road at the time, and not to meet the case sought to be set up on the appeal.

*H. M. Sturges*, for the respondent. The case is indistinguishable from *Rex v. Dublin Justices* (3), which should be followed.

[He was stopped by the Court.]

LORD ALVERSTONE C.J. Notwithstanding the ingenious argument on behalf of the appellant I am of opinion that this appeal must be dismissed. The appellant was convicted before

a speed or in a manner which is dangerous to the public, having regard to all the circumstances of the case, including the nature, condition and use of the highway, and to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway, that person shall be guilty of an offence under this Act."

(1) By s. 11, sub-s. 2: "Any person adjudged to pay a fine exceeding twenty shillings under this Act may appeal against the conviction, in the same manner as he may appeal if ordered to be, imprisoned without the option of a fine."

(2) [1903] 1 K. B. 56, at p. 61.

(3) [1904] 2 I. R. 698.

1906  


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 ELWES  
 v.  
 HOPKINS.  


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 Lord Alverstone  
 C.J.

the magistrates for driving a motor car at an excessive rate of speed "having regard to all the circumstances of the case." He appealed from that conviction to quarter sessions, and, at the hearing, objection was taken on his behalf to evidence being admitted to shew the general nature of the traffic on the road in question—that is to say, evidence as to the traffic usually on the road, but not on it at the actual moment when the appellant was driving his car upon it. In my judgment that evidence was distinctly admissible quite apart from the concluding words of sub-s. 1 of s. 1, "having regard . . . to the amount of traffic which actually is at the time, or which might reasonably be expected to be, on the highway." To me it seems difficult to conceive how it can be said that evidence as to the user of the highway ought not to be received.

RIDLEY J. and DARLING J. concurred.

*Appeal dismissed.*

Solicitors for appellant: *Crowders, Vizard, Oldham & Co., for Ticehursts, McIlquham & Wyatt, Cheltenham.*

Solicitors for respondent: *Field, Roscoe & Co., for Griffiths & Waghorne, Cheltenham.*

W. J. B.

[IN THE COURT OF APPEAL.]

PALETHORPE v. HOME BREWERY COMPANY,  
LIMITED.

C. A.

1906

May 3.

*Landlord and Tenant—Lease of Licensed Premises—Construction of Covenant—Covenant to keep and conduct Premises in a regular and proper Manner—Under-lease—Offence by Under-lessee against Licensing Laws—Refusal to renew Licence—Liability of Lessee.*

A lease of licensed premises to a company contained the following covenant: "Provided always that the company will not at any time during the continuance of the said term, without the consent of the lessor first had and obtained, convert the said demised premises into a shop, warehouse, or place of sale for goods or merchandise, or into a private dwelling-house, or open or use, or suffer the same to be opened or used, for any other purpose than as a beer-house, and also will at all times during the said term keep and conduct the same in a regular and proper manner in every respect, and will apply for and use their best endeavours when required to obtain a renewal of the existing licences or permission of Her Majesty's justices of the peace for the vending of wines, ale, beer, and tobacco on the said demised premises; and shall not knowingly or willingly do or suffer any act whereby the same may become indorsed, forfeited, or the renewal thereof refused; and will not commit any offence against the licensing laws for the time being in force." The lessees having under-let the premises, the under-lessee was convicted of an offence against the licensing laws, by reason of which the renewal of the licences was refused. In an action by the lessor against the lessees for breach of the covenant:—

*Held*, that there had been a breach of the covenant at all times during the term to keep and conduct the premises in a regular and proper manner in every respect, for which the lessees were liable.

*Bryant v. Hancock*, [1899] A. C. 442, distinguished.

APPEAL from the judgment of Farwell J., sitting as a judge of the King's Bench Division, in an action tried by him without a jury.

The action was brought for damages for the breach of a covenant contained in a lease as after mentioned.

By a lease dated June 1, 1897, the plaintiff demised a beer-house to the defendants for the term of seven years from March 25, 1897, at the yearly rent of 80*l*. The lease contained, among others, the following covenant: "Provided always that the company will not at any time during the continuance of the

C. A.      said term, without the consent of the lessor first had and  
1906      obtained, convert the said demised premises into a shop, ware-  
PALETHORPE      house, or place of sale for goods or merchandise, or into a private  
v.      dwelling-house, or open or use, or suffer the same to be opened  
HOME      or used, for any other purpose than as a beer-house; and also  
BREWERY      will at all times during the said term keep and conduct the  
COMPANY,      same in a regular and proper manner in every respect; and will  
LIMITED.      apply for, and use their best endeavours, when required, to obtain  
a renewal of the existing licences or permission of Her Majesty's  
justices of the peace for the vending of wines, ale, beer, and  
tobacco on the said demised premises; and shall not knowingly  
or willingly do or suffer any act whereby the same may become  
indorsed, forfeited, or the renewal thereof refused; and will not  
commit any offence against the licensing laws for the time being  
in force." The lease did not contain any covenant against  
assignment or under-letting. On March 24, 1900, the defendants  
under-let the premises by an agreement for a tenancy from year  
to year; and, subsequently, the under-lessee was convicted by a  
Court of summary jurisdiction of an offence against the licensing  
laws by permitting drunkenness upon the premises, the result of  
which was that, at the next general annual licensing meeting,  
the renewal of the licences was refused. The plaintiff thereupon  
brought the action for breach of the covenant to keep and  
conduct the demised premises in a regular and proper manner in  
every respect. Farwell J. gave judgment for the plaintiff.

*Hugo Young, K.C., and Wood Hill, for the defendants.*  
The contention for the plaintiff will be that the branch of  
the covenant whereby the lessees covenant to keep and  
conduct the premises at all times during the term in a regular  
and proper manner must be read independently of the remainder  
as an absolute covenant, and that there has been a breach of it  
by the defendants. It is submitted that the covenant must be  
read as a whole, and each branch of it construed with relation to  
the others. It is a rule of construction that effect must, if  
possible, be given to all the words of an instrument; but, if the  
construction contended for by the plaintiff be adopted, the earlier  
branch of the covenant covers everything, and no effect is given



to the provisions of the latter part of it. With regard to acts by which the licence may become indorsed or forfeited, or the renewal thereof may be refused, the covenant is that the lessees will not knowingly or willingly do or suffer such acts. Some effect must be given to the words "knowingly or willingly"; but, if the plaintiff's construction of the covenant is right, they have no effect, for any act whereby the licence may become indorsed or forfeited, or the renewal thereof may be refused, will be a breach of the former part of the covenant. The same considerations apply with regard to the express covenant as to offences against the licensing laws. The covenant ought to be construed so as to exclude from the general provisions of the former branch of it matters specially provided for by the subsequent branches of the covenant. Ample effect may be given to the former branch of it upon that view. It would apply, for instance, to minor irregularities or improprieties in the conduct of the house which would give it a bad reputation, apart from more serious matters which would amount to causes for forfeiting the licence, or offences against the licensing laws. Both the subsequent branches of the covenant apply only to acts done, either by the lessees themselves, or by their servants or agents, and not to acts done by an assignee or under-tenant. The decision of the House of Lords in *Bryant v. Hancock* (1) is an authority in favour of the view that the generality of the words in the earlier branch of the covenant must be restricted as regards matters as to which a more limited express provision is made by subsequent branches of the covenant.

Secondly, the covenant to keep and conduct the premises in a regular and proper manner is, in substance, equivalent to a covenant that the defendants will not do acts which amount to conducting them in an irregular and improper manner. That being so, the case of *Wilson v. Twamley* (2) is an authority to shew that the act complained of here as amounting to a breach of the covenant, having been committed by an under-lessee, and not by a servant or agent of the defendants, is no breach of the covenant.

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(1) [1899] A. C. 442.

(2) [1904] 2 K. B. 99.

C. A. *Montague Lush, K.C., and A. Houston, for the plaintiff.* The  
 1906 first part of the covenant contains an absolute covenant at all  
 PALETHORPE times during the said term to keep and conduct the demised  
 v. premises, i.e., the beer-house, in a regular and proper manner in  
 HOME all respects. That covenant would cover offences against the  
 BREWERY licensing laws, and in the case of such an offence, whether by  
 COMPANY, themselves or any under-lessee, leading to the closing of the  
 LIMITED. premises as a beer-house, the defendants would, under the  
 covenant, be responsible. The principle of construction relied  
 on by the defendants is not applicable so as to override the  
 plain and unambiguous terms of the first part of the cove-  
 nant. *Bryant v. Hancock* (1) was an altogether different case.  
 There the question was as to the meaning of "discontinuing" a  
 licence in the first part of the covenant, and whether it included  
 non-renewal of the licence as well as forfeiture; and it was held  
 that, the term being ambiguous, the meaning of it must be  
 confined to forfeiture, inasmuch as non-renewal of the licence  
 was provided for by the second part of the covenant. In that  
 case there was no absolute covenant to keep and conduct the  
 premises in a regular and proper manner, but the first branch  
 of the covenant was to conduct the business in a proper and  
 orderly manner so as to afford no ground or pretence for dis-  
 continuing the licence. The case is no authority for the con-  
 struction of the covenant here in question. The construction  
 contended for by the defendants really involves the omission  
 from the first part of the covenant of the words "at all times  
 during the said term" and "in all respects." It is difficult  
 to see to what the first part of the covenant could apply on  
 the defendants' construction of it. It would not be a sound  
 principle of construction, where the words of one branch of a  
 covenant are quite clear, as in the present case, to qualify  
 them by reference to other branches of it. The framer of  
 such a covenant in a lease first uses words of a comprehensive  
 character to cover everything by which the licence may be  
 endangered, and then ex majori cautela deals with specific  
 matters that occur to him; but, when the words of the  
 general provision are clear, it would not be right to cut them

(1) [1899] A. C. 442.

down by reference to the subsequent provisions as to specific matters.

[STIRLING L.J. referred to *Watson v. Charlesworth*. (1)]

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VAUGHAN WILLIAMS L.J. We have heard a long argument as to the applicability or non-applicability to this case of the decision in *Bryant v. Hancock* (2); but it really seems to me that we need not trouble ourselves with that question, for I think that we have in the present case an absolute covenant of which there was a complete breach, quite irrespective of the considerations which were necessarily gone into by the House of Lords in *Bryant v. Hancock*. (2) In the present case the covenant is as follows. [The Lord Justice then read the covenant.] It is said, and I think rightly, that there is a positive covenant that the lessees "will at all times during the said term keep and conduct the same"—i.e., the demised beer-house—"in a regular and proper manner in every respect," and that, as a matter of fact, in the events that have happened there has been a breach of that covenant by the lessees; and, therefore, we need not go into any such questions as were discussed in *Bryant v. Hancock*. (2) In the case of *Wilson v. Twamley* (3) the Master of the Rolls, speaking of *Bryant v. Hancock* (2), said: "The covenant in that case consisted of two parts, the first part being absolute in its terms, and the second being qualified by the introduction of the word 'wilfully.' The second part of the covenant applied to a matter which might also, in the ordinary use of language, be said to be described by the language of the first part; a matter which, if the word 'wilfully' had not been used in the second part, would come equally well within the terms of either part. The difficulty was as to whether, upon the construction of the covenant, the matter in question might be treated as coming within the first part, which was wide enough to cover it, and was not qualified by the word 'wilfully'; and it was held that, because the covenant was divided into two parts, one so qualified and the other unqualified in its terms, the

(1) [1905] 1 K. B. 74; [1906] (2) [1898] 1 Q. B. 716; [1899] A. C. 14. A. C. 442.

(3) [1904] 2 K. B. 99.

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subject-matter of the first part must be limited, so as to give effect to the qualification imported by the word 'wilfully' in the second part." If we adopt, as I think we must, the construction of the covenant which has been urged upon us by the plaintiff's counsel, there is no such difficulty in this case as arose in *Bryant v. Hancock* (1), because we have here a positive covenant by the lessees that they "will at all times during the said term keep and conduct the same"—i.e., the beer-house—"in a regular and proper manner in all respects." In point of fact the beer-house was not so kept and was closed, which was clearly, in my opinion, a breach of the covenant. For these reasons I think that the appeal must be dismissed.

STIRLING L.J. and FLETCHER MOULTON L.J. concurred.

*Appeal dismissed.*

Solicitors for plaintiff: *Field, Roscoe & Co., for Warren & Allen, Nottingham.*

Solicitors for defendants: *Dawes & Son.*

1) [1898] 1 Q. B. 716; [1899] A. C. 442.

[IN THE COURT OF APPEAL.]

WAITE v. JENNINGS.

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May 3.

*Landlord and Tenant—Lease—Licence to assign—Covenant by proposed Assignee—Liability for Rent after further Assignment—Validity of Covenant—“Fine or Sum of Money in the nature of a Fine”—Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 2, sub-s. 9—Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 3.*

A lease contained a condition against assigning without licence, which was not to be refused unreasonably, but there was no provision as to payment of a fine in respect of such a licence. Upon an application by the holder of the lease for a licence to assign to the defendant in this action the plaintiff, as lessor, required as a condition of granting the licence that the defendant should covenant to pay the rent and perform the covenants of the lease during the residue of the term. The licence to assign was by deed to which the defendant was a party, and in which he entered into the stipulated covenant. The defendant subsequently assigned the lease with licence. In an action on the defendant's covenant to recover from him one quarter's rent due from but unpaid by the tenant:—

*Held* that, whether such a covenant as the defendant entered into was or was not in the nature of a fine within the meaning of s. 3 of the Conveyancing Act, 1892, the statute, not having made the payment of a fine illegal, afforded no defence to an action on the defendant's covenant.

*Semble* (per Vaughan Williams and Stirling L.JJ., Fletcher Moulton L.J. dissenting), that a covenant which secures to a lessor no sum of money beyond the rent to which he is entitled under the lease is not in the nature of a fine within the meaning of s. 3 of the Conveyancing Act, 1892.

APPEAL from the judgment of Darling J. at the trial of the action without a jury.

By an indenture of lease dated October 29, 1895, the Burlington Hotel, Brighton, was leased from March 25, 1895, for the term of twenty-one years. The three parties to this lease were described as the mortgagee, the lessors, and the lessee respectively. This deed contained a covenant by the lessee, for himself, his executors, administrators and assigns, not to assign the premises without the consent in writing of the lessors, which consent the lessors covenanted with the lessee should not be unreasonably or capriciously withheld. The lease contained no provision as to the payment of a fine in respect of a licence to assign. Between



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the date of the lease and the year 1902 there were several assignments of the lease.

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An indenture dated June 9, 1902, and made between John Dear of the first part, William Waite (the plaintiff in this action) of the second part, Bass, Ratcliffe & Gretton, Limited, of the third part, and Arthur Lewis Jennings (the defendant in this action) of the fourth part, recited the lease of October, 1895, and that the reversion expectant on the lease was vested in John Dear, and the interest of the lessors was vested in William Waite, and that it had been represented that the leasehold interest was vested in or capable of transmission by Bass, Ratcliffe & Gretton, Limited. The deed further recited that the last-mentioned firm as mortgagees were desirous of assigning to Arthur Lewis Jennings the premises demised by the indenture of lease of 1895 for the residue of the term of twenty-one years, and had applied to Dear and Waite for their licence, which they were willing to grant upon the terms thereafter appearing. The deed then witnessed that in consideration of the covenants and provisions thereafter contained Dear and Waite granted to Bass, Ratcliffe & Gretton, Limited, licence to assign the demised premises to Arthur Lewis Jennings for the residue of the term on condition that Jennings would not assign without licence, which was not to be unreasonably withheld. The deed further witnessed "that in consideration of the aforesaid licence and of the premises the said Arthur Lewis Jennings, for himself, his executors, administrators and permitted assigns, doth hereby covenant with the said John Dear and William Waite respectively that he the said Arthur Lewis Jennings will as from the 25th day of March, 1902, and at all times during the residue of the said term of twenty-one years duly pay the rent reserved by and perform and observe all the covenants, agreements and provisions in the said recited indenture of lease and on the part of the lessee, his executors, administrators and assigns to be performed and observed, but without prejudice to the liability of the lessee, his executors, administrators and assigns under or by virtue of the said indenture of lease and the covenants, provisions and conditions therein contained."

In pursuance of this licence the premises were assigned to the defendant Jennings, who at a subsequent date obtained a licence



to assign, under which the lease became vested in one Escott. A quarter's rent became due under the lease from Escott, and as he did not pay this action was brought to recover the amount from the defendant upon his covenant contained in the indenture of June 9, 1902.

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The learned judge gave judgment for the plaintiff.

The defendant appealed.

May 2. *S. O. Buckmaster, K.C.*, and *W. de B. Herbert*, for the defendant. The covenant by the defendant to be liable for the rent covers the whole term, and was imposed as a condition for the granting of the licence to assign to him. Under the covenant the lessor need not have recourse to anyone else who might be liable for the rent, and if the defendant is called on to pay he cannot recover the amount from anyone. Consequently, although the defendant assigns and has no further interest in the term, he remains primarily liable for the rent. In that case the lessor obtains a right to be paid money from a man who would not be liable but for the covenant. The Conveyancing Act, 1892, s. 3, in the absence of stipulation to the contrary in the lease, declares that no fine is to be payable for a licence to assign, and the definition of a fine in the Conveyancing Act, 1881, s. 2, sub-s. 9, says that fine includes any payment, consideration or benefit in the nature of a fine. The obligation imposed by this covenant comes within this definition, and none the less because it does not imply an immediate payment of money, and it follows that it cannot be enforced by action and that the plaintiff was not entitled to judgment. *In re Cosh's Contract* (1), which was cited in the Court below, does not apply, because that was a case of security given by a person to do that which he was under an obligation to do.

*T. H. Carson, K.C.*, and *J. D. Crawford*, for the plaintiff. The statute imports into leases that are silent as to the imposition of a fine on assignment a statutory contract on the part of the landlord that he will not require payment of a fine. The covenant of the defendant amounted to nothing more than security for the payment of rent should he subsequently assign,

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and the landlord obtained no pecuniary advantage beyond the amount of the rent to which he was entitled, and consequently there was nothing in the nature of a fine. If the holder of the lease had objected to the demand of the landlord for such a covenant by the proposed assignee the question would have arisen whether an assignment could be made without licence on the ground that the condition was unreasonable. This course was not taken, but the defendant, who was in an independent position and capable of contracting, entered into this covenant. Whether it is to be treated as a fine or not his contract was a valid one, and the plaintiff is entitled to sue upon it.

[They cited *Young v. Ashley Gardens Properties* (1) and *In re Spark's Lease*. (2)]

May 3. VAUGHAN WILLIAMS L.J. This is an appeal from a judgment of Darling J. I do not propose to state the facts at length but only sufficiently to enable me to deal with the point of law that is raised. The licence to assign upon which the question arises was granted by persons who represented respectively the original lessor of the premises and his mortgagee, and the assignment contemplated was, by parties who after several assignments were the holders of the lease, to the defendant in this action. The licence is dated June 9, 1902, and was by an indenture made between John Dear, in whom the reversion expectant on the lease was then vested; the present plaintiff, in whom the interest of the lessors was vested; the firm of Bass, Ratcliffe & Gretton, in whom the leasehold interest was vested; and the defendant the proposed assignee. At the end of the deed there is this clause: "And this indenture also witnesseth, that in consideration of the aforesaid licence and of the premises the said Arthur Lewis Jennings, for himself, his executors, administrators and permitted assigns, doth hereby covenant with the said John Dear and William Waite respectively that he the said Arthur Lewis Jennings will as from the 25th of March, 1902, and at all times during the residue of the said term of twenty-one years duly pay the rent reserved by and perform and observe all the covenants, agreements and provisions contained in the said recited

(1) [1903] 2 Ch. 112

(2) [1905] 1 Ch. 456.

indenture of lease and on the part of the lessee, his executors, administrators, and assigns to be performed and observed, but without prejudice to the liability of the lessee, his executors, administrators and assigns under or by virtue of the said indenture of lease and the covenants, provisions and conditions therein contained." The defendant subsequently obtained a licence to assign the premises, and this action is brought upon the defendant's covenant contained in the deed of 1902 to recover one quarter's rent, which the person to whom he assigned has failed to pay.

It will be observed that the covenant is not one that ceased to operate when the defendant Jennings parted with his interest in the lease by assignment, but is one that continues in operation for the residue of the term.

The defence set up in the affidavits of the defendant is based on s. 3 of the Conveyancing Act, 1892, which runs thus: "In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent." Our attention was called to a provision in s. 2, sub-s. 9, of the Conveyancing Act, 1881, to the effect that "fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift." It was said that this particular covenant falls within the words of s. 3 of the Act of 1892 as being a fine or sum of money in the nature of a fine, and the definition in the earlier Act was relied on in support of this view. In my judgment that is not so. There is here merely a covenant to secure the rent, and not a covenant to pay any money over and above the rent reserved. In my view there is no fine or anything in the nature of a fine, but in saying this I am merely expressing an opinion, because it is not essential to the judgment

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that we are going to deliver that I should determine this point, and it is not desirable, because, as I understand, not all the members of the Court are agreed upon it.

Even if the sum covenanted to be paid were a fine or a sum of money in the nature of a fine, it would not, in my judgment, be possible for the defendant to raise the provisions of s. 3 of the Act of 1892 as a defence to this action. The effect of that section is not to make the payment of a fine an illegal thing, but only to read into the lease, as between the parties to it, a provision that no fine shall be payable for a licence to assign. The defendant, as a proposed assignee, is not a party to the lease, and under those circumstances it seems to be impossible for the defendant to get out of the provisions of s. 3 of the Act of 1892 a defence to this action. It may well be that, as between the parties to the lease, the lessee would have been entitled to disregard the absence of a licence, if the lessor refused to grant one unless and except upon the condition of a covenant for the payment of rent during the term. That, however, is not the position of the parties in this case, and the judgment in favour of the plaintiff must stand and this appeal be dismissed.

STIRLING L.J. I am of the same opinion. Sect. 3 of the Conveyancing Act, 1892, does not prohibit the taking of a fine on the granting of a licence to assign. What it does is to provide that, in the absence of an express provision to the contrary, a covenant in a lease against assigning without consent shall be deemed to be subject to a proviso that no fine or sum of money in the nature of a fine shall be payable in respect of such consent. In the present case the lease contains no express provision to the contrary, and the proviso must be read into it. Suppose that on an assignment the lessor had actually taken a fine from the proposed assignee, what would be the position of affairs? It does not seem to me that the taking of the fine would be illegal so that the assignee who paid it could recover it back. In this case no money was paid, but the proposed assignee entered into a personal covenant to pay the rent reserved by the lease and to perform the covenants in it. Subsequently he assigned the lease, and he is sued for a quarter's rent that fell due after



that assignment. Is that a valid claim? It may be that the covenant was entered into without consideration. Assume that it was, still that would afford no defence to an action on the covenant in the deed. If it were shewn that any undue advantage was taken of the proposed assignee, or that there was fraud or duress, the case would be different, but no such defence is set up in the present case. I am of opinion on these grounds that there is no valid defence to this action. That is sufficient to dispose of this appeal, but I wish to add that, as at present advised, I share the view that there is here nothing in the nature of a fine, but I do not desire to base my judgment on that point.

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FLETCHER MOULTON L.J. I agree that the defence set up in this action cannot be sustained.

In this case an important question has been raised under s. 3 of the Conveyancing Act, 1892. The object of that section is clear. Leases, in the absence of stipulation to the contrary, are assignable, and it is to the interest of the public that they should be so. But in order that a lease may not fall into undesirable hands, it is usual for the lessor to insert a covenant against assignment without his consent, and there is generally, but by no means universally, a provision that such consent is not to be refused unreasonably. Now it is evident that an unqualified covenant not to assign without consent may be turned from a protection to the lessor to a means of profit to him, if money or money's worth can be demanded as a condition of granting the consent. If this be done, the lessee is placed in much the same position as a copyholder who is subject to an arbitrary fine on alienation. That being so, the Legislature stepped in to prevent the lessor thus abusing his powers. It has done so by providing in s. 3 of the Conveyancing Act, 1892, that into every lease containing a covenant against parting with the possession of the property leased without the consent of the lessor there shall be read in (unless the lease contains an express provision to the contrary) a proviso that no fine or sum of money in the nature of a fine shall be payable for or in respect of a licence or consent to assign. In other words, the Legislature declares that the power to refuse consent to assign is not to be made a

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source of profit to the lessor. But if the Legislature thought the evil sufficiently great to justify its interference I cannot believe that it would be content to limit the remedy to a case of the payment of money, and we see that this is so when we turn to s. 2, sub-s. 9, of the Conveyancing Act, 1881. That sub-section contains a definition of a "fine" which makes that expression include "premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift." Looking at the terms of this definition, I am of opinion that it is expressly intended thereby to make the word "fine" when used in these Acts include any valuable consideration given or required under such circumstances that, if it were money, it would be what is commonly known as a "fine." The phrase "in the nature of a fine," when applied to the case of obtaining consent to assign, means nothing more than "paid as the price for" such consent. If this view is correct, s. 3 of the Act of 1892 must be read as importing a proviso into the lease that no payment, consideration, or benefit shall accrue, be required or taken by the lessor in respect of a licence or consent to assign as the price or condition for granting the same.

Turning to the present case, the question is whether this covenant by the assignee for the payment of the rent and the performance of the covenants during the whole term is a consideration or benefit which is the price or condition of the granting of the licence to assign. I cannot doubt that it is. The defendant may at some future time desire to assign the lease, and in such case, instead of freeing himself from all future liability for the payment of the rent and the performance of the covenants on assigning the lease, the defendant under this covenant will continue liable as if he were still the holder of the lease. That is an onerous condition on him and a benefit to the lessor; it is the price or condition of the licence to assign, so that in my opinion it comes within the mischief aimed at by the Act, and was a breach of the proviso which is deemed to be read into the lease. But this does not make the covenant void or give to the defendant any right of complaint. The Legislature does not make the exaction of a fine a *malum prohibitum*, but only reads into the lease a covenant in favour of the leaseholder that no fine



shall be exacted, and he alone can take advantage of it. This is perfectly just. The price paid for a licence to assign must in the ordinary course come out of the pocket of the assignor, whether it is paid by him or by the assignee, for, taking the present case as an instance, the defendant who was going to purchase the lease must be assumed to have taken into consideration the obligation under which he came by reason of the covenant in determining what he would give for the lease. It therefore lessened the price which the assignor obtained for the lease and to that extent injured him, but it did not injure anyone else. Looking at the entering into this covenant as part of the price that the defendant paid for the assignment, I can see no want of consideration or illegality which is available to him as a defence to this claim; and therefore, the covenant being valid and there having been a breach, there is no defence to this action, and the appeal must be dismissed.

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*Appeal dismissed.*

Solicitors for plaintiff: *Charles A. Bannister & Reynolds.*

Solicitors for defendant: *Carthew & Wheeler.*

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[IN THE COURT OF APPEAL.]

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STUCKEY AND OTHERS *v.* HOOKE.

*Factory Acts—Landlord and Tenant—Lease—Covenant by Lessee to pay and discharge “Outgoings and Impositions”—Underground Bakehouse—Structural Alterations required by Borough Council—Expenses of—Jurisdiction of High Court ousted—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 101, sub-ss. 2, 8.*

A lease of premises, which were used for the purposes of a baker's shop, and comprised an underground bakehouse, contained a covenant by the lessee to pay and discharge all burdens, duties, assessments, outgoing and impositions, charged, assessed or imposed on the demised premises, or upon the landlord or tenant in respect thereof (landlord's property tax only excepted). The borough council having refused to grant the certificate necessary for the use of the bakehouse under the Factory and Workshop Act, 1901, s. 101, sub-s. 2, unless certain structural alterations were made, the assignee of the lease, who was in occupation of the premises, applied to a police magistrate, under sub-s. 8 of the above-mentioned section, to apportion the expenses of the alterations as between the lessors as owners and himself as occupier of the premises, and the magistrate made an order that three-fourths of the expenses should be borne by the owners and one-fourth by the occupier. The lessors, having carried out the requisite alterations, sued the assignee of the lease upon the above-mentioned covenant to recover the total amount of the expenses of those alterations. The defendant paid into Court the proportion of the expenses which the magistrate had ordered to be paid by him:—

*Held*, on the authority of *Horner v. Franklin*, [1905] 1 K. B. 479, that the jurisdiction of the High Court was excluded in such a case by the Factory and Workshop Act, 1901, s. 101, sub-s. 8, and therefore the action was not maintainable.

*Goldstein v. Hollingsworth*, [1904] 2 K. B. 578, and *Morris v. Beal*, [1904] 2 K. B. 585, discussed.

APPEAL from the judgment of Warrington J., sitting in the King's Bench Division, in an action tried by him without a jury.

The action was by lessors against an assignee of the lease upon a covenant in the lease as after mentioned.

The plaintiffs were the trustees under the will of one Robert James Stuckey, deceased. Certain premises situate within the borough of Islington, which were then used for the purposes of a baker's shop and comprised an underground bakehouse, had

been demised in 1886 by the trustees of the said will for a term of twenty-one years from Midsummer, 1886, and the defendant was the assignee of that lease. The lease contained a covenant by the lessee for himself and his assigns that he or they would during the term bear, pay and discharge the main drainage and sewers rate, and all burdens, duties, assessments, outgoings and impositions whatsoever, which then were or at any time or times during the said term should be rated, taxed, charged, assessed or imposed on the demised premises, or any part thereof, or upon the landlord or tenant in respect thereof, or of the rent thereby reserved (landlord's property tax only excepted).

The defendant was in occupation of the premises, and continued the use of the same as a baker's shop and bakehouse. On February 12, 1903, the Islington Borough Council refused to certify under s. 101, sub-s. 2, of the Factory and Workshop Act, 1901, that the bakehouse in the basement of the demised premises was suitable for the purpose of being used as an underground bakehouse, unless certain structural alterations were made. On December 29, 1903, the defendant laid a complaint before a metropolitan police magistrate, alleging that the plaintiffs were the owners of the premises, which were a place let as a bakehouse, and for which a certificate as required by s. 101 of the Factory and Workshop Act, 1901, could not be obtained, unless structural alterations were made, and that the whole of the expenses of the alterations ought to be borne by the plaintiffs as owners, and applying that the Court should make such order concerning the expenses as appeared to the Court to be just and equitable, or, in the alternative, that the Court should determine the lease of the premises. On the hearing of the complaint the magistrate ordered that the expenses of the structural alterations should be apportioned as follows, namely: that three-fourths of the sum of 200*l.* (that being the cost of the alterations as agreed between the parties) should be paid by the owners, the plaintiffs, and one-fourth of that sum by the occupier, the defendant. The plaintiffs, having executed the structural alterations necessary for obtaining the certificate requisite for the use of the bakehouse from the borough council, sued the defendant to recover the total expenses of the work under the above-mentioned covenant, or, in the alternative,

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C. A. for the sum of 50*l.* as money paid at the request of the defendant  
 1906 under the magistrate's order. The defendant had paid the sum  
 of 50*l.* into Court.

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The learned judge, on the authority of *Goldstein v. Hollingsworth* (1) and *Morris v. Beal* (2), gave judgment for the plaintiffs for the amount of the expenses. (3)

*Danckwerts, K.C.*, and *Kerly*, for the defendant. This case is governed by the decision in the case of *Horner v. Franklin* (4), in which it was held upon similar legislation in the Factory and Workshop Act, 1891, s. 7, sub-s. 2, with regard to the provision of means of escape from fire, that the jurisdiction of the High Court was excluded by a provision empowering the county court to apportion expenses as between the owner and occupier of premises. The cases of *Goldstein v. Hollingsworth* (1) and *Morris v. Beal* (2) do not really conflict with that decision. The question in those cases was not whether an action would lie in the High Court, but arose upon a case stated by the magistrate as to whether his decision was correct.

*R. C. Glen (Bankes, K.C.*, with him), for the plaintiffs. The decision in *Horner v. Franklin* (4) does not govern this case. That decision was upon the Factory and Workshop Act, 1891, s. 7, sub-s. 2, which differs materially in its provisions from s. 101 of the Act of 1901. That section of the Act of 1891 made the

(1) [1904] 2 K. B. 578.

(2) [1904] 2 K. B. 585.

(3) By the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 101, sub-s. 1, an underground bakehouse is not to be used as a bakehouse unless it was so used at the passing of the Act. By sub-s. 2, subject to the foregoing provision, after January 1, 1904, an underground bakehouse is not to be used unless certified by the district council to be suitable for that purpose. By sub-s. 8: "Where any place has been let as a bakehouse, and the certificate required by this section cannot be obtained unless structural alterations

are made, and the occupier alleges that the whole or part of the expenses of the alterations ought to be borne by the owner, he may by complaint apply to a Court of summary jurisdiction, and that Court may make such order concerning the expenses or their apportionment as appears to the Court to be just and equitable under the circumstances of the case, regard being had to the terms of any contract between the parties, or in the alternative the Court may, at the request of the occupier, determine the lease."

(4) [1905] 1 K. B. 479.

doing of the work compulsory, and imposed the whole of the expenses of the work on the owner, unless he could satisfy the county court judge that the occupier ought to pay a portion of them. Sect. 101 of the Act of 1901 does not impose the expenses of the alterations on anyone. The effect of that section is merely that, unless the alterations are made, the licence for use of the underground bakehouse will not be given. There is no obligation under that section on anyone to do the works. It is optional on the part of the tenant whether he will continue to use the premises as a bakehouse; and, if he chooses to do so and the alterations are thereby rendered necessary, then the expenses of them become "outgoings" within the meaning of the covenant. The words "regard being had to the terms of any contract between the parties" in s. 101, sub-s. 8, mean that, if the contract between the parties provides as to which of them shall bear these expenses, the Court of summary jurisdiction has no jurisdiction to decide otherwise. The jurisdiction of that Court to apportion the expenses, therefore, only arises in cases where there is no contract between the parties as to these expenses. There were no such words in the section upon which *Horner v. Franklin* (1) was decided. It would appear from the observations made by Romer L.J. at the end of his judgment in that case that he desired to leave open the question whether the decision in that case applied to cases under s. 101 of the Factory and Workshop Act, 1901. In *Goldstein v. Hollingsworth* (2) the judges expressed an opinion that such an action as the present was maintainable.

*Danckwerts, K.C.*, for the defendant, was not called upon to reply.

VAUGHAN WILLIAMS L.J. We think that this appeal must be allowed. The learned judge appears to have thought that the case was governed by the decisions in *Goldstein v. Hollingsworth* (2) and *Morris v. Beal*. (3) I cannot agree with him in that view. So far from establishing that the High Court has jurisdiction to entertain such an action as this, the actual

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(1) [1905] 1 K. B. 479.

(2) [1904] 2 K. B. 578.

(3) [1904] 2 K. B. 585.



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decisions in those cases appear to me to tend in the contrary direction. In *Goldstein v. Hollingsworth* (1) a case had been stated by a magistrate, and the judgment of the Court appears to me to have assumed that he had jurisdiction, and dealt with the question whether his decision was right or wrong; and they decided not to send the case back to him, on the ground that, having regard to the covenant in the lease, if they did send it back, the only conclusion at which he could arrive was that no part of the expenses ought to be borne by the landlord. *Morris v. Beal* (2) was a similar case, and the Lord Chief Justice treated it as governed by *Goldstein v. Hollingsworth*. (1) I do not think that either of these cases decides the question raised in the present case. Under these circumstances we have to consider whether there was jurisdiction in the High Court to determine this dispute between the parties, or whether the effect of the legislation is that the Court of summary jurisdiction is by virtue of s. 101 of the Factory and Workshop Act, 1901, constituted the statutory tribunal by which the question must be decided. In the case of *Horner v. Franklin* (3) we decided that the effect of a similar provision in s. 7, sub-s. 2, of the Factory and Workshop Act, 1891, was to exclude the jurisdiction of the High Court, and I cannot myself see any distinction in point of principle between that case and the present.

It was urged that in that case Romer L.J. in the last passage of his judgment reserved to himself the right to consider the grounds on which *Goldstein v. Hollingsworth* (1) and *Morris v. Beal* (2) were decided when those cases came properly before the Court for consideration. I do not think that he meant by what he there said to leave open any question with regard to the applicability of the principle of the decision in *Horner v. Franklin* (3) to cases such as *Goldstein v. Hollingsworth* (1) and *Morris v. Beal*. (2) I think what he really meant was to reserve the question whether those cases decided anything inconsistent with the view which we took in *Horner v. Franklin* (3), namely, that the High Court had no jurisdiction to entertain the action. I do not myself see that the actual judgment in *Goldstein v.*

(1) [1904] 2 K. B. 578.

(2) [1904] 2 K. B. 585.

(3) [1905] 1 K. B. 479.



*Hollingsworth* (1) is in any way inconsistent with the decision in *Horner v. Franklin*. (2) It was urged that the decision in the latter case did not apply to the present, because it was decided on a different enactment. That is no doubt so, but I do not see any substantial distinction for the present purpose between the two enactments. One difference is, that under s. 7, sub-s. 2, of the Act of 1891 the owner had to make the application for apportionment of expenses, whereas under s. 101 of the Act of 1901 the occupier has to make it. I do not think that is a substantial distinction. The only other difference between the two sections appears to be that under the latter enactment it is provided that the magistrate shall have regard to the terms of any contract between the parties. That expressly provides what in *Horner v. Franklin* (2) we thought might be implied from the words "just and equitable" in the section upon which that case was decided. I cannot see any reason why this case does not come within the decision in *Horner v. Franklin*. (2) On these grounds I think that the appeal must be allowed.

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STIRLING L.J. I agree.

FLETCHER MOULTON L.J. I am of the same opinion. I only wish to add that, according to my view, s. 101, sub-s. 8, of the Factory and Workshop Act, 1901, makes a Court of summary jurisdiction the statutory arbitrator to determine the question how the expenses of the alterations provided for by the section are to be borne. That Act imposed considerable burdens on persons wishing to continue the use of underground bakehouses, and it would not have been practicable to lay down in the statute itself rules for the apportionment of these burdens between owners and occupiers. Consequently the sensible course was taken of making a Court of summary jurisdiction the statutory tribunal to apportion them, and I think that the decision of that tribunal was intended to be final. It is provided that, in arriving at that decision, regard shall be had to the terms of any existing contract between the parties, as part of the circumstances of the case, but, as it appears to me, only as such. I think that the

(1) [1904] 2. K. B. 578.

(2) [1905] 1 K. B. 479.

C. A.      apportionment is to be such as is just and equitable under all  
 1906      the circumstances of the case, of which the contractual relations  
 STUCKEY      between the parties form part only. I ought to add that I share  
       v.      the doubts expressed in *Horner v. Franklin* (1) as to whether  
 HOOKE.      expenses of the kind here in question come within the terms  
 ———  
 Fletcher      of covenants such as that contained in the lease with which we  
 Moulton L. J.      are dealing.

*Appeal allowed.*

Solicitors for plaintiffs: *Gellatly & Sons.*

Solicitors for defendant: *Young & Sons.*

E. L.

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[IN THE COURT OF APPEAL.]

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 May 15.

MARTIN AND OTHERS, JUDGMENT CREDITORS *v.* NADEL,  
 JUDGMENT DEBTOR; DRESDNER BANK, GARNISHEES.

*Practice—Garnishee Order—Discretion to make Order—Incomplete discharge of  
 Garnishee—Liability to pay a Second Time—Refusal of Order—Order XLV..  
 rr. 1, 7.*

The making of a garnishee order is discretionary, and an order which would have the effect of leaving the garnishee liable to pay the amount of his debt a second time is inequitable, and will be refused.

APPEAL from an order of Sutton J. at chambers.

An action in the High Court resulted in a judgment for 1400*l.* in favour of the judgment creditors against the judgment debtor, who was a foreigner resident out of the jurisdiction. An appeal was taken to the Court of Appeal, and the judgment was affirmed. The judgment debtor appealed to the House of Lords, and to enable him to do so he deposited in Court a sum of 200*l.* as security for costs, and was required to give a recognizance in respect of a sum of 500*l.* as further security. He accordingly made an arrangement with the branch of the Dresdner Bank at Berlin, where he resided, under which he paid into that bank a sum of 500*l.*, and the garnishees, the London branch of the bank, entered into a recognizance for that amount. The appeal to the House of Lords was dismissed with costs, which were met

(1) [1905] 1 K. B. 479.

by the payment out to the judgment creditors of the sum deposited in Court, and a payment by the London branch of the Dresdner Bank, under the recognizance entered into, of a little more than 300*l.* The balance of the 500*l.* not required to meet costs was 198*l.* 9*s.* 8*d.*, and the judgment creditors obtained a garnishee order nisi against the London branch of the Dresdner Bank in respect of that amount, on the ground that it was a debt due from the bank to the judgment debtor. An order absolute was subsequently made by the Master and confirmed by the learned judge, who gave leave to appeal.

The garnishees appealed.

May 14. *M. Lush, K.C., and Ralph V. Bankes*, in support of the appeal. In *London Corporation v. London Joint Stock Bank* (1) Lord Blackburn pointed out that "The garnishee, if he is to be obliged to pay the money, must be discharged from paying it to his creditor." This order appears to have been made on the ground that if Nadel sued the bank in these Courts there would be no defence. If that is so, it is no answer to the objection to this order, for if he sued the bank in Berlin there would also be no defence, for the money is owing to him there, where he paid it into the bank. It may be that the German Courts would have regard to a judgment in an action in these Courts, but they would not treat a garnishee order, which forms part of a code relating to execution, as binding upon them. That a garnishee order is a process of execution, and not the creation of a right, is shewn by *Roberts v. Death* (2) and *Goodman v. Robinson*. (3) Further, it appears from the wording of Order XLV., r. 1, that an order for attachment of debts is discretionary, and, from the general scope of the order, including the provision of r. 7, that the order can only apply to persons subject to English law.

*Disturnal*, for the judgment creditors. The branch bank in England would have no answer to an action in this country by Nadel for the balance of the money in their hands as money had and received to his use, and it is therefore the subject of a

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(1) (1881) 6 App. Cas. 393, at  
p. 415.

(2) (1881) 8 Q. B. D. 319.

(3) (1886) 18 Q. B. D.

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garnishee order. It is said that the possibility of a claim by Nadel in Germany makes all the difference, but the question of foreign law does not arise in this case. The litigation was in this country, and the branch bank was accepted as security because it was within the jurisdiction. The garnishees cannot dispute their liability to the judgment debtor, so that there is no question of title. An enforced payment by them under the process of this Court would be recognized by a foreign Court, and would protect the Dresdner Bank wherever it might be sued from a further claim for the money so paid.

*M. Lush, K.C., in reply.*

May 15. VAUGHAN WILLIAMS L.J. This is an appeal from an order made by Sutton J. at chambers.

The order was made in garnishee proceedings taken under Order XLV., r. 1, and it ordered that the present appellants should forthwith pay to the judgment creditors a specified amount due from the appellants to the judgment debtor, or so much as should be sufficient to satisfy the claim of the judgment creditor. The question is whether that order was rightly made.

With regard to the debt due from the garnishees to the judgment debtor, it was, as I understand, a debt contracted in Germany. Nadel, being an appellant to the House of Lords, had to provide security for the costs of his appeal, and a sum of 200*l.* which he had in cash was paid into Court. He was allowed to provide for a further sum of 500*l.* by getting the London branch of the Dresdner Bank to become bondsmen as sureties, and he paid the amount into the branch of that bank at Berlin, and the bank credited him with 500*l.* Nadel failed in his appeal to the House of Lords, and accordingly a part of the money secured by the recognizance had to be paid in respect of costs, with the result that there remained a sum of money in the hands of the Dresdner Bank at Berlin, which they now hold as money had and received to the use of Nadel. It is that debt from the bank which is the subject of the garnishee order. The reason why it is suggested that the order can be made in England is that the Dresdner Bank have the



branch here which entered into the recognizance. What is said against the making of the order is that if the bank are compelled under the order to pay the execution creditors they will still remain liable to be sued in Berlin for the amount, and would not discharge their liability by reason that they had been obliged to pay, in England, the debt due from them to Nadel.

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There is no dispute between the parties to this appeal as to the general proposition laid down in the Exchequer Chamber in *Wood v. Dunn* (1), following the decision in *Allen v. Dundas*. (2) That proposition is stated by Channell B., in giving the judgment of the Court in the first case that I have mentioned, to this effect: "The law will never compel a person to pay a sum of money a second time which he had paid once under the sanction of a Court having competent jurisdiction." It is said that to confirm the order made in the present case would place the Dresdner Bank in the position which these cases recognize as unfair, because the bank might in proceedings by Nadel in the German Courts be made to pay the amount a second time. There was some discussion as to whether it was the law of Prussia that if Nadel sued the Dresdner Bank in Berlin they could not set up in answer to the action that they had paid the amount claimed under a garnishee order made in these Courts. I do not think that ultimately it was disputed that such a payment would be no answer to the action. It appears to me to be clear that a garnishee order is of the nature of an execution, and is governed by the *lex fori*; and by international law an execution which has been carried into effect in a foreign country under foreign law, and has taken away part of a man's property, is not recognized as binding. There can be no doubt that under the rules of international law the Dresdner Bank could not set up, in an action in Berlin, the execution levied in this country in respect to this debt. If we consider the converse case it is clear, to my mind, that we should take that view of a similar transaction occurring abroad. That being the case, we must consider whether the Court should refuse to permit this execution on the ground that the effect might be that the bank might be called on to pay the debt a second time in Germany. I am

(1) (1866) L. R. 2 Q. B. 73, at p. 80.

(2) (1789) 3 T. R. 125.

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not going to decide on the ground that the debt was really contracted in Germany, and that prima facie German law would govern the contract. To my mind that makes no difference, and for this reason: It is said that the execution creditor has a right to this order ex debito justitiæ, but that apparently is not so. I think that the case of *Roberts v. Death* (1) decides in principle that this Court ought not to make an order for payment upon a garnishee application in a case where it would be inequitable to do so. It is true that in the case I have just mentioned the equity was not raised on the part of the garnishee, but by a cestui que trust behind the garnishee making the objection that the money it was proposed to attach was trust money. It is pointed out in the case that there is no express provision in the rules to enable the cestui que trust to come forward in that way. But although the case was not provided for in the rules the Court refused to allow the money to be attached, on the ground that the matter was in their discretion, and that it would be inequitable to make the order asked for. I am unable to cite any authority which directly covers this case, or covers generally the case where the obligation to pay does not give the garnishee a complete discharge from his debt. I must therefore decide this case on the ground that it would be inequitable to order the bank to pay the money to the execution creditor when that payment would leave them still liable to an action to recover the same debt brought in a competent Court at the foreign place where the parties reside. For these reasons I think the order should not have been made, and the appeal must be allowed.

STIRLING L.J. I am of the same opinion. I think that the Court is not under an obligation ex debito justitiæ to make an order under Order XLV., r. 1, but has a judicial discretion to be exercised upon good grounds. In support of this view I may refer to what was said by Cotton L.J. in *Roberts v. Death*. (2) The Lord Justice, after pointing out that r. 7 of the order then in force gave power to the Court or a judge to cite any person other than the garnishee and to inquire into the nature of his claim,

(1) 8 Q. B. D. 319.

(2) 8 Q. B. D. 319, at p. 324.



continued: "But I do not rely on that, as I am of opinion that whenever the judge is informed on any reasonable ground that such an order ought not to be made, he should withhold making the garnishee order absolute for taking the money of one person to pay the debt due from another." The question, therefore, in this case is whether there is any reasonable ground why the order should not be made. The material facts are that the applicants for the order recovered judgment in an action against Nadel, who resides in Berlin, and has at the Dresdner Bank there a sum of money standing to his credit. The head office of the bank is at Dresden, and it has branches in Berlin and London. It is objected, and is to be taken as a fact, that the German law would not recognize a payment made under a garnishee order in this country, and that consequently Nadel would be entitled to sue the bank in Berlin in respect of the debt due to him.

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v.

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Stirling L.J.

Mr. Dicey, at p. 318 of his treatise on the Conflict of Laws, points out the rule of law that debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced. On the facts of this case the debt of the bank to Nadel would be properly recoverable in Germany. That being so, it must be taken that the order of this Court would not protect the bank from being called on to pay the debt a second time. That is a good reason why the order should not be made, for to make it would be inequitable and contrary to natural justice. In support of this view I may refer to the opinion of Lord Watson in *London Corporation v. London Joint Stock Bank* (1), where, speaking of the custom of foreign attachment in the City of London, he says that "The custom would not be a reasonable one unless it went the length of affording protection to the garnishee when he obeys the order of the Court." Order XLV., r. 7, provides, that payment by a garnishee is to be a valid discharge as against the debtor, liable under a judgment or order, to the amount paid or levied, although such proceeding may be set aside or the judgment or order reversed, but that provision cannot affect the rights of a person

(1) 6 App. Cas. 393, at p. 421.

C. A. who is not within the jurisdiction of the Court and is not subject to its jurisdiction.

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MARTIN I agree, therefore, that this appeal must be allowed.

r.  
NADEL. *Appeal allowed.*

Solicitors for judgment creditors: *Barnett & Shirer, for Facon & Creassey, Nottingham.*

Solicitors for garnishees: *Oppenheimer & Southern.*

A. M.

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May 7.

### GRIVELL v. MALPAS.

*London—Public Health—Offences—Unsound Food—Article “liable to be seized”—Article in Possession of Purchaser—Liability of Vendor—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), s. 47, sub-s. 3.*

The respondent, a wholesale dealer, sold to a retail pork butcher a quantity of pigs' plucks, one of which was unsound, unwholesome, and unfit for the food of man. The unsound pluck was seized in the purchaser's shop by the appellant, a sanitary inspector, who obtained an order for its destruction. In proceedings against the respondent under s. 47, sub-s. 3, of the Public Health (London) Act, 1891, for selling an article liable to be seized and condemned under the section, the magistrate found that the unsound pluck was not exposed for sale, and would not have been sold or offered for sale by the retail shopkeeper until the sanitary inspector had passed it, and he accordingly, without calling upon the respondent, dismissed the summons, holding that no offence had been committed under sub-s. 3:—

*Held*, that the magistrate was wrong in stopping the case; that a prima facie case had been made out against the respondent calling for an answer; and that the case must go back to the magistrate to be proceeded with.

*Per* Lord Alverstone C.J.: Sub-s. 3 of s. 47 is intended to deal with the case of the vendor of an article intended for the food of man, which in fact at the time it is sold by him is in such a condition that it is liable to be seized, that is, in the condition of being unsound and unfit for the food of man.

*Per* Channell J.: The words “any article liable to be seized” in sub-s. 3 mean any article prima facie liable to be seized by reason of its condition.

*Reg. v. Dennis*, [1894] 2 Q. B. 458, considered.

CASE stated by a metropolitan police magistrate.

By an information laid by the appellant Grivell, a sanitary inspector for the borough of Paddington, the respondent Malpas was charged with having on September 7, 1905, at the Cattle

Market, Islington, sold an article intended for the food of man, which was unsound, unwholesome, and unfit for the food of man, namely, the pluck of a pig. At the hearing the following facts were proved or admitted:—

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On September 7, 1905, the appellant, in the discharge of his duty, entered the shop of one Alfred Robinson, a pork butcher, where he found hanging at the doorway opening into the road a bunch of pigs' plucks, one of which was unsound, unwholesome, and unfit for the food of man, being studded with tubercles. The plucks had been delivered at the shop by or on behalf of the respondent in execution of a contract for the daily sale by the respondent to Robinson of the plucks of pigs slaughtered by the respondent. It had for two years been customary for the appellant to call daily on weekdays at Robinson's shop to examine the articles of food purchased by him for the purposes of his business as pork butcher, and Robinson stated in his evidence that he had not seen the bunch of plucks before the appellant examined them on September 7, they having been delivered only half an hour previously. Robinson further stated that the plucks would not have been sold or offered for sale by him until the appellant had passed them as fit for the food of man. The unsound pluck was seized by the appellant, and an order was obtained by him under s. 47, sub-s. 2, of the Public Health (London) Act, 1891, for its destruction. No proceedings were taken against Robinson, on whose premises the unsound pluck was found. The magistrate was satisfied that the unsound pluck when it was seized by the appellant was not exposed for sale, and would not have been sold until the inspector had passed it, and that therefore no offence had been committed under s. 47 of the Public Health (London) Act, 1891 (1); he accordingly, without calling on the respondent, dismissed the summons.

(1) Sect. 47, sub-s. 1, of the Public Health (London) Act, 1891: "Any medical officer of health or sanitary inspector may . . . enter any premises and inspect and examine . . . (b) any article . . . intended for the food of man and or exposed for sale or deposited in any place for the purpose of sale or of preparation for sale, the proof that the same was not exposed or deposited for any such purpose, or was not intended for the food of man, resting with the person charged; and

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The question for the opinion of the Court was whether the magistrate was right in dismissing the information and summons.

*R. Cunningham Glen*, for the appellant. The magistrate was wrong in dismissing the summons, as a prima facie case had been made out against the respondent requiring an answer. The onus was on the respondent to shew that the article in question was not sold by him for the food of man, as it was "liable to be seized" in the possession of Robinson: *Reg. v. Dennis*. (1)

*Clarke Hall*, for the respondent. To convict the respondent under s. 47, sub-s. 3, it is essential that it should be proved that the article was "liable to be seized" at the time it was taken by the inspector, and "liable to be seized" as being in the hands of the purchaser intended for the food of man. In this case, as the magistrate has found that Robinson did not intend the meat to be sold for the food of man, it was not "liable to be seized": see per Cave J. in *Reg. v. Dennis* (2), and per Hawkins J. (3) Sub-s. 3 of s. 47 is a new provision

if any such . . . article appears to such medical officer or inspector to be diseased, or unsound, or unwholesome, or unfit for the food of man, he may seize and carry away the same, himself or by an assistant, in order to have the same dealt with by a justice."

Sub-s. 2: "If it appears to a justice that any . . . article which has been seized or is liable to be seized under this section is diseased, or unsound, or unwholesome, or unfit for the food of man, he shall condemn the same, and order it to be destroyed or so disposed of as to prevent it from being exposed for sale or used for the food of man; and the person to whom the same belongs or did belong at the time of sale or exposure for sale, or deposit for the purpose of sale or of preparation for sale, or in whose

possession or on whose premises the same was found, shall be liable on summary conviction to a fine . . . or, . . . to imprisonment. . . ."

Sub-s. 3: "Where it is shewn that any article liable to be seized under this section, and found in the possession of any person, was purchased by him from another person for the food of man, and when so purchased was in such a condition as to be liable to be seized and condemned under this section, the person who so sold the same shall be liable to the fine and imprisonment above mentioned, unless he proves that at the time he sold the said article he did not know, and had no reason to believe, that it was in such condition."

(1) [1894] 2 Q. B. 458.

(2) [1894] 2 Q. B. 458, at p. 471.

(3) [1894] 2 Q. B. 458, at pp. 478-9.



applicable to London only, and should be construed strictly. If the view of the appellant is right, a perfectly innocent purchaser might be convicted under sub-s. 2.

*R. Cunningham Glen*, in reply. The case of *Billing v. Prebble* (1) shews that sub-s. 3 was inserted to meet such a case as this. *Reg. v. Dennis* (2) does not support the respondent's contention. The actual decision there was that there was no sale in the first instance of articles intended for the food of man.

LORD ALVERSTONE C.J. If the question in this case had been *res integra* I should have felt no difficulty about it. The facts are very simple. The respondent sold to Robinson an article as to which there was strong evidence that at the time of sale it was unfit for human food. Whether or not the respondent has a defence in respect of that transaction I express no opinion, as the case was stopped before he was called upon. The magistrate took this course upon the ground, as he has said, that the unsound article when seized by the appellant was not exposed for sale, and would not have been sold until the inspector had passed it, and that therefore no offence had been committed. In these circumstances ought we to say that there was no case for the respondent to answer?

The question turns upon s. 47 of the Public Health (London) Act, 1891. As to sub-s. 2 of that section, the respondent's counsel has suggested to us that, unless some limitation is placed upon it, the innocent purchaser of food which happens to have been sold in a condition unfit for human food would be liable to be convicted for having it in his possession. That argument may possibly have to be considered at some future time when the question arises, but the practical answer to it is that no conviction could take place in those circumstances, and there is so much else in the sub-section dealing with the substantial offence of having food exposed or deposited for sale that, as I have said, the point as to some absolutely innocent purchaser having it in his possession may be left for consideration when it arises. No similar difficulty occurs when we come to sub-s. 3. Apart from previous discussion of that sub-section, I should have thought

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(1) (1896) 66 L. J. (Q.B.) 180.

(2) [1894] 2 Q. B. 458.

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that it was intended to deal with the case of a vendor of an article intended to be used for the food of man, which in fact at the time it was sold and purchased was in a condition that it could be seized, namely, in the condition of being unsound and unfit for the food of man. It seems to me that that is the clear purview and object of the sub-section. One can see very plainly what was the intention of the Legislature. The earlier Acts had not provided for such a case, and there was the decision in *Vinter v. Hind* (1) that proceedings could not be taken against the vendor. Then came this sub-section, under which, as it seems to me, where there is evidence that the food, at the time of sale, was in an unsound condition, and that it was intended for the food of man, a *prima facie* case is established which requires an answer.

It is contended, however, for the respondent that *Reg. v. Dennis* (2) has put a narrower construction upon this sub-section. It is said that the article must be liable to be seized as against the purchaser, and liable to be seized because the purchaser was going to deal with it in an unlawful manner, namely, by selling it for the food of man. I agree that there are expressions in the judgments in *Reg. v. Dennis* (2) which seem to suggest that some members of the Court took the view that, in order that the article should be liable to be seized, it must have been intended at the time of seizure to be wrongfully used by the man who purchased it from the original vendor. I desire to point out that in *Reg. v. Dennis* (2) the question which we are now considering was not necessarily before the Court. There the jury had been wrongly directed with reference to the original sale, in which it was not plain that the walnuts—the articles of food there in question—had been sold for the food of man; there was an improper direction as to the substantial part of the offence, namely, whether there had been a sale at all of an article intended for the food of man which was in fact unfit for the food of man. As to the observations in *Reg. v. Dennis* (2) it seems to me that it was not intended in that case to lay down the broad proposition that a person could not be convicted under sub-s. 3 unless he could also be convicted under sub-s. 2. I

(1) (1882) 10 Q. B. D. 63,

(2) [1894] 2 Q. B. 458.



think that the distinction between the two sub-sections was pointed out in *Billing v. Prebble* (1), where it was in terms suggested that sub-s. 3 was inserted for the very purpose of meeting the case of proceedings taken against the vendor where there was no sufficient case for proceeding against the purchaser under sub-s. 2. In my opinion we are not prevented by any decision of this Court from giving effect to the plain meaning of the sub-section, and as to the opinions in *Reg. v. Dennis* (2), relied on by the respondent, I think, as I have said, that they were not necessary for the decision, and further, that they do not go nearly so far as it is contended they do. The case must be remitted to the magistrate for further inquiry.

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DARLING J. I am of the same opinion.

CHANNELL J. I agree. The case of *Reg. v. Dennis* (2) is very difficult to follow. The Court there was very much divided in opinion, and it seems to me the judgments did not entirely agree. It is very difficult to say what was the exact view of the majority, but I take from the judgment of Cave J. (3) the following passage as representing their view: "I do not understand the majority of the Court to say that there was not evidence on which the defendant might properly have been convicted, but merely to think that the summing up of the chairman, as given by him, was not sufficient." If that was the judgment of the majority of the Court, it does not prevent us deciding the present case in accordance with our view of the statute. There is also the subsequent case of *Billing v. Prebble* (1), which shews that the judges there took the same view that we are taking of *Reg. v. Dennis* (2), which case, of course, so far as regards the real decision of the majority of the Court, was binding upon them as it is upon us. Assuming the matter is open to us, it seems to me that the words "any article liable to be seized" in sub-s. 3 mean, as Cave J. pointed out in *Reg. v. Dennis* (4), an article *prima facie* liable to be seized by reason of its condition. The sub-section was not intended to introduce special provisions in

(1) 66 L. J. (Q.B.) 180,

(2) [1894] 2 Q. B. 458,

(3) [1894] 2 Q. B. 458, at p. 473.

(4) [1894] 2 Q. B. 458, at p. 472,

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favour of the person in whose possession the article is found when you are dealing with the charge against the vendor; "liable to be seized," as I have said, really means *prima facie* liable to be seized by reason of its condition. The whole clause, when thus regarded, appears to be workable.

The questions in this case will be, when it goes back, first, what was the condition of the article when it was sold by the respondent; and, secondly, whether at the time he sold it he did not know, and had no reason to believe, that it was in an unfit condition for human food.

Although not without some doubt as to the true effect of *Reg. v. Dennis* (1), I think we are justified in holding that the magistrate was wrong.

*Appeal allowed.*

Solicitor for appellant: *John H. Hortin.*

Solicitors for respondent: *W. T. Ricketts & Son.*

(1) [1894] 2 Q. B. 458.

W. J. B.

MAYOR, &c., OF WESTMINSTER v. GORDON HOTELS,  
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*London—Removal of Refuse—Ordinary Refuse of Hotel—House or Trade Refuse—Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), ss. 30, 33, 141.*

The ordinary refuse of a hotel, comprising such things as ashes from the grates, sawdust, empty bottles and tins, straw packing cases, tea leaves, waste paper, egg shells, lemon peel, dust from the rooms and staircases, &c., is "house refuse" within the meaning of s. 30 of the Public Health (London) Act, 1891, which the sanitary authority is bound to remove without payment.

In determining whether refuse is "house refuse" or "trade refuse," regard should be had rather to its nature than to its origin or the manner in which it is produced.

*Gay v. Cadby*, (1877) 2 C. P. D. 391, and *St. Martin's Vestry v. Gordon*, [1891] 1 Q. B. 61, considered and discussed.

CASE stated by a metropolitan police magistrate.

The appellants were summoned to answer an information preferred by the respondents, which set forth that the appellants on April 7, 1905, at the Hotel Metropole, being the sanitary authority for the City of Westminster, did unlawfully fail without reasonable cause to comply with s. 30 of the Public Health (London) Act, 1891 (1), inasmuch as the house refuse not having

(1) By 54 & 55 Vict. c. 76 (the Public Health (London) Act, 1891), s. 30, sub-s. 1: "It shall be the duty of every sanitary authority—  
(a) to secure the due removal at proper periods of house refuse from premises, and the due cleansing out and emptying at proper periods of ashpits, and of earth closets, privies, and cesspools (if any) in their district, and the giving of sufficient notice of the times appointed for such removal, cleansing out, and emptying; and—  
(b) where the house refuse is not removed from any premises in the district at the ordinary period, or any ashpit, earth-closet, privy, or cesspool in or under any building in

the district is not cleansed out or emptied at the ordinary period, and the occupier of the premises serves on the authority a written notice requiring the removal of such refuse, or the cleansing out and emptying of the ashpit, earth closet, privy, or cesspool, as the case may be, to comply with such notice within forty-eight hours after that service, exclusive of Sundays and public holidays."

By sub-s. 2: "If a sanitary authority fail without reasonable cause to comply with this section, they shall be liable to a fine not exceeding twenty pounds."

By s. 141: "The expression

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been removed from the premises at the ordinary period, and, the respondents, the occupiers of the premises, having on April 5, 1905, served on the appellants a written notice requiring the removal of such refuse, the appellants did not comply with the notice within forty-eight hours after such service. Upon the hearing of the summons the appellants were convicted and were fined 10s. and costs. At the hearing the following facts were proved or admitted :—

The respondents (a limited company) were the owners of, and carried on the business of hotel-keepers at, the Hotel Metropole, which was within the district for which the appellants were the sanitary authority. Until February 27, 1905, the appellants had been in the habit of removing daily all refuse from the hotel. On that day the appellants, after taking legal advice, and being of opinion that the refuse which they had been in the habit of removing was wholly or in part trade refuse, gave notice to the respondents that on and after April 1, 1905, they would not remove trade refuse from the hotel except in pursuance of s. 33 of the Public Health (London) Act, 1891, that is, upon being required so to do by the respondents, and that they would make a charge of 10s. for a load or portion of a load of trade refuse removed by them. From February 27 to April 1 the appellants continued to remove daily from the hotel all refuse, as had previously been their custom, but on and subsequently to April 1 the appellants' servants, acting pursuant to orders, refused to remove any refuse other than clinkers and ashes from the furnaces connected with the heating and electrical lighting of the hotel, and no refuse was on that day, or subsequently till April 10, removed from the hotel other than such clinkers or ashes. A large quantity of refuse was consequently accumulated upon the hotel premises, the immediate removal of which was necessary for the sanitary welfare of the inhabitants of the hotel and neighbourhood, and on April 3 the general manager of the hotel wrote to the assistant city engineer

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'house refuse' means ashes, cinders, breeze, rubbish, night-soil and filth, but does not include trade refuse. The expression 'trade refuse' means

the refuse of any trade, manufacture, or business, or of any building materials."

requesting the removal of the refuse as early as possible; in answer to which the assistant city engineer wrote on April 4 calling attention to the notice of February 27, and stating that: "The clinkers and ashes which the council remove from your hotel under the Public Health Act, if required to be done daily, must be placed on the street kerb at an early hour in the morning or some convenient place on the premises to be arranged; otherwise, the clinker refuse from the furnaces used for heating, &c., and ashes from fires are collected weekly." On April 5 the respondents gave to the appellants a notice in writing requiring the removal of house refuse from the hotel pursuant to the Public Health (London) Act, 1891. The appellants did not remove or cause to be removed any refuse other than clinkers and ashes from the furnaces until April 10, upon which day they wrote with regard to the present summons, which had been granted on April 8, and also said that "in the interests of public health instructions have been given for the immediate collection and removal of all refuse from the premises in question which the council have been required to remove, without prejudice to the rights of the council to claim a reasonable sum for the removal of so much of the refuse as is trade refuse." Subsequently to the sending of this letter the appellants caused all refuse upon the hotel premises to be removed daily.

The refuse which the appellants did not remove or cause to be removed from the hotel consisted of the following items: ashes from the grates, sawdust strewn on the kitchen floors for the sake of cleanliness, empty sauce bottles and preserve tins, being waste and empty bottles and tins of the sauces and various comestibles used in the kitchen, straw packing cases for bottles, tea leaves, waste paper, egg shells, lemon peel, the general dust from the rooms and staircases, and from time to time small quantities of broken crockery ware and glass, which latter formed no appreciable proportion of the whole refuse.

With the exception of the ashes and clinkers from the boiler furnaces, all the refuse of the hotel, including the ashes from the grates, was unsorted, save that the kitchen refuse (consisting principally of ashes, sawdust swept off the floor, preserve tins,

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bottles, egg shells, and other things that remain after the removal of the contents, but not including offal or parings, which all went into the washtub) was placed by the respondents in bags or other receptacles, and the refuse from the rooms and other parts of the building (consisting principally of sweepings from the floors and ashes from the grates) was shot down and remained until collected in a bin or chamber at the foot of the dust shoot.

For the appellants it was contended: (1.) That all the refuse of the hotel, the substantial constituents of which are above enumerated, was not house refuse, but was trade refuse within the meaning of the Public Health (London) Act, 1891, on the ground that it arose from the carrying on of the trade or business of hotel-keeping, and that in determining the question whether refuse was house refuse or trade refuse regard was to be had not to its nature only, but to its source and the manner in which it was produced; (2.) that even if the appellants were wrong as to the preceding contention, the facts set forth as to the taking of legal advice and as to the belief of the appellants that the refuse was wholly or partly trade refuse constituted "reasonable cause" within the meaning of s. 30, sub-s. 2, of the Act for not complying with the section, and that therefore no offence had been committed by the appellants; (3.) that it was the duty of the appellants under the Act to remove free of charge insanitary house refuse only, and that (a) part at least of the refuse from the hotel was trade refuse and not house refuse, and (b) that part of the refuse, even if it was house refuse, was not insanitary, and that under the Act there was no obligation upon the appellants to sort or divide up the refuse, and that they were therefore entitled to refuse to remove any of the refuse and the offence complained of had not been committed by them.

For the respondents it was contended (*inter alia*) that, whether or not the refuse was house refuse, it was the duty of the appellants to remove it upon being required to do so by the respondents, and that, if they disputed its being house refuse, it was for them to have had the dispute determined under s. 33 of the Act; that the refuse being of the same character and description as that which the appellants were required to move free

of charge from every large dwelling-house in their district, although admittedly larger in quantity, was house refuse within the meaning of the Act and not trade refuse; that the onus was upon the appellants of shewing that they had reasonable cause for their refusal to comply with the notice of April 5; that the mere belief, however bona fide, that the refuse was trade refuse was not a reasonable cause within the meaning of s. 30, sub-s. 2; and that the appellants had under the circumstances failed to remove the refuse without reasonable cause.

The learned magistrate found as facts that the appellants had failed to remove or caused to be removed from the respondents' hotel, within forty-eight hours after service upon them by the respondents of a written notice requiring its removal, the refuse above described; that such refuse was all refuse of the same character and description as that which is removed by the sanitary authority from every large private dwelling-house, greater in quantity, but in character the same as that which results from the ordinary domestic uses and purposes of any large private house or mansion; and that it was ordinary domestic refuse resulting from and incidental to the supply of warmth, food, and other refreshments to the guests who had come to the hotel. He further found as a fact that, if sanitary considerations were to be taken as one of the tests, the refuse was, with the exception perhaps of part of the paper, all refuse of a kind which on sanitary grounds and in the interest of the health of the inhabitants ought not to be allowed to remain at the hotel. He was therefore of opinion that the refuse which the appellants had failed to remove was "house refuse" within the meaning of that expression in s. 30 of the Public Health (London) Act, 1891, and he further held that the appellants had not shewn reasonable cause for their failure to comply with the respondents' notice requiring the removal of the refuse. He therefore convicted the appellants.

The question for the opinion of the Court was whether, on the facts set out, the conviction was right in law. (1)

(1) A cross-summons had been granted at the instance of the corporation against the respondents to answer a complaint that a dispute or difference of opinion within the meaning of s. 33, sub-s. 2, of the

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*Macmorran, K.C. (Courthope Munroe with him)*, for the appellants. The conviction was wrong; the refuse described in the case was not house refuse, but was trade refuse, which the appellants were not bound to remove without payment. There is no recorded decision under the Public Health (London) Act, 1891, and the previous decisions, some of which are apparently not in favour of the appellants' contention, were under the Metropolis Management Act, 1855, the language of which was very different, and which contained no definition of house refuse or of trade refuse. In *Holborn Guardians v. St. Leonard, Shoreditch Vestry* (1), it was held that the sanitary authority was liable to remove dirt, ashes, rubbish, and filth from the dusthole of a workhouse, and it is to be implied from the decision that the Court held this refuse to be house refuse. In *Gay v. Cadby* (2) ashes arising from coals burnt in the furnace of a steam engine used in a pianoforte manufactory were held to be trade refuse, but it must be admitted that the decision was not approved by the majority of the Court of Appeal in *St. Martin's Vestry v. Gordon* (3), where it was held that ashes and clinkers produced in the furnaces of boilers used for supplying steam for working an electric light engine in a hotel, and also for warming and cooking, were not trade refuse, and must therefore be removed by the scavengers without payment. The Public Health (London) Act, 1891, by s. 30 lays upon the sanitary authority the duty of removing "house refuse," which by s. 141 is defined to mean ashes, cinders, breeze, rubbish, night-soil and filth, but not to include trade refuse; it is necessary, therefore, in many cases to ascertain whether refuse is trade refuse before deciding whether it is house refuse. "Trade refuse" by s. 141 means the refuse of

Public Health (London) Act, 1891, had arisen between the owners and occupiers of the Hotel Metropole and the corporation as sanitary authority as to what was to be considered as trade refuse. The magistrate held that the refuse was not trade refuse, but stated a case, which upon appeal was heard with and followed the

result of the case now reported. From the decision on the cross-summons leave was given to appeal, as will be seen in the judgment of Lord Alverstone C.J.

(1) (1876) 2 Q. B. D. 145.

(2) 2 C. P. D. 391.

(3) [1891] 1 Q. B. 61.

any trade, manufacture, or business, and the refuse in the present case comes within that definition.

[LORD ALVERSTONE C.J. Must not regard be had to the nature of the business carried on, as in the case of a restaurant?]

Yes, and the refuse of a restaurant would be trade refuse within the meaning of this Act, for it would not be produced at all but for the business which is carried on; all refuse produced as the result of carrying on a business must be trade refuse.

[LORD ALVERSTONE C.J. How do you distinguish between a nobleman's house and a small hotel? You must contend that the receipt of money for the accommodation afforded makes all the difference.]

Yes, and regard must also be had to the way in which the refuse is produced. In the present case, except the ashes, the refuse was practically the rubbish of the kitchen, which was necessarily incidental to the carrying on of the business of a hotel; though it is no doubt true that in their nature the things were not different from what would be produced in a private house. [He also cited *Collins v. Paddington Vestry* (1); *Reg. v. Bridge* (2); *St. Margaret's Vestry v. Queen Anne's Mansions Co.* (3); *London and Provincial Laundry Co. v. Willesden Local Board.* (4)]

*Danckwerts, K.C.* (*R. Cunningham Glen* with him), for the respondents. The Public Health (London) Act, 1891, is a consolidation Act, and marks no new departure in the legislation on this subject. The definition of "house refuse" in s. 141 is simply the application of the Metropolis Management Act, 1855, in accordance with the decision of the Court of Appeal in *St. Martin's Vestry v. Gordon.* (5) In ss. 125 and 128 of the Act of 1855 the division was made between trade refuse and what may be called non-trade refuse, and precisely the same division is preserved in the Act of 1891.

[LORD ALVERSTONE C.J. What should you say as to the refuse of premises used solely as a restaurant and for no other purpose?]

(1) (1879) 48 L. J. (Q.B.) 345.

(3) (1893) 57 J. P. 277.

(2) (1890) 24 Q. B. D. 609.

(4) [1892] 2 Q. B. 271.

(5) [1891] 1 Q. B. 61.



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No doubt that would be an arguable question, but it is submitted that it would be house refuse within the meaning of this Act of Parliament. The object of the statute is to secure the removal of house refuse by the sanitary authority in the interests of public health, and house refuse should be interpreted to mean such refuse as is ordinarily produced in a house. It is the character of the refuse, and not the way in which it is produced, which should be looked at. There is no difference in principle between the kind of refuse produced in a large private house and in a small hotel. Further, a hotel is essentially a collection of temporary dwellers under one roof, and the fact that a considerable number of people live in one house instead of in separate houses does not prevent all the rubbish from being domestic rubbish. A clear dividing line between house refuse and trade refuse is supplied by Bramwell B. in *Lyndon v. Standbridge* (1), where he defines the "dust, ashes and rubbish," which, under the Towns Improvement Clauses Act, 1847, had to be removed by the Commissioners as "house, occupation, inhabitaney, or domestic rubbish"; and in *London and Provincial Laundry Co. v. Willesden Local Board* (2) that definition was accepted by Charles J. as equivalent to the expression "house refuse" in s. 42 of the Public Health Act, 1875.

*Macmorran, K.C.*, in reply. In a place where a business is carried on refuse of both kinds may be produced. The refuse from the preparation of food in a hotel is refuse produced in the course of providing food for the guests, and is trade refuse.

*Cur. adv. vult.*

April 6. LORD ALVERSTONE C.J. This case raises a point of some nicety. The question is whether certain refuse, which is specified with particularity in the case, is refuse which the appellants are bound under the provisions of the Public Health (London) Act, 1891, to remove without payment. I need not refer in detail to the nature of the refuse; it is sufficient to say that it is the ordinary refuse of a very large hotel. So far as it was necessary to deal with the question of fact, the learned

(1) (1857) 2 H. & N. 45.

(2) [1892] 2 Q. B. 271.



magistrate, in holding that the refuse was to be removed without extra payment, has found that "such refuse was all refuse of the same character and description as that which is removed by the sanitary authority from every large private dwelling-house, greater in quantity no doubt, but in character and description the same as that which results from ordinary domestic purposes or uses of any large private house or mansion, and it was ordinary domestic refuse incidental to the supply of warm food and other refreshments to the guests who came to the respondents' hotel." No doubt there was a very large quantity of this refuse, having regard to the fact that this case is stated with reference to one of the very large hotels which have sprung up in London in recent years. The question depends upon the construction to be placed on certain sections of the Act of 1891. Sect. 30 provides that it is to be the duty of every sanitary authority to secure the due removal at proper periods of house refuse from premises. In s. 33 there is a provision as to trade refuse and as to payment, and also a provision for the assessment (if necessary) at a petty sessional Court of the amount payable in respect of the removal of such trade refuse. The interpretation clause (s. 141) says that the expression "house refuse" means ashes, cinders, breeze, rubbish, night-soil and filth, but does not include trade refuse, while the expression "trade refuse" is defined as meaning the refuse of any trade, manufacture, or business, or of any building materials. The further definition of "street refuse" it is unnecessary to examine in detail; it was a new sub-division included separately for the first time in the Act of 1891, having been dealt with in the earlier Acts in another way. The separate definition of the word "house" has, I think, no bearing upon the present case.

Apart from authority, the case would certainly have presented more difficulty than it actually does; but looking at the facts, and looking at the Act of 1891 by itself, I am of opinion that on the construction of that Act this is house refuse. A line must of course be drawn somewhere, and it is easy to put cases in which the bulk of the refuse is produced by trade, as was the case in *Gay v. Cadby* (1), to which I shall refer later on; but I cannot

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help thinking that, having regard to the previous decisions, the Act of 1891 meant to draw a distinction between refuse such as is ordinarily produced by houses and refuse which is produced by trades. It is, as I have said, difficult to draw the line, and I am not at all sure on which side of the line an ordinary restaurant would fall; by which term I mean a restaurant in which no one resides, but to which people simply come in considerable numbers to take their meals in the middle of the day or in the evening, the business producing a considerable quantity of refuse. In the particular case before us I think that the true view is to regard a hotel (for this purpose only) as a collection of a number of dwellings producing the same kind of house refuse as would be produced in a large private mansion or a house where boarders are taken in. For a time I thought there was much to be said in favour of the view insisted on for the appellants, that if it is desired that a vestry or corporation should take away the refuse without payment, the householder ought to keep the ashes, cinders, and that kind of refuse distinct from the refuse more directly produced by the preparation of food for the inmates of the hotel; but upon consideration I think that that is too refined a distinction. The more correct view to take is, in my opinion, that, when the refuse is the same in kind as ordinary house refuse, we ought not to draw such a distinction or to put upon the householder or person producing the refuse the burden of separating it, unless it ought clearly to be regarded as trade refuse.

That is the conclusion to which I have come as to the interpretation of the Act, and that view is strengthened by a consideration of antecedent legislation and of the decisions upon it. I agree with the contention of the respondents' counsel that in a consolidation Act different rules of construction are to some extent applicable; but this is also an amending Act, and regard must be had to the actual language of its provisions. Had that language been such as to obviously establish a different view, I do not think that we could have regarded previous legislation or judicial decisions; but under the circumstances I think that the previous decisions afford a guide, and that their effect is to confirm the view which I have already expressed.

Previous cases have been decided upon (among other statutes) the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 125 and 126 of which imposed upon local authorities the duty of collecting and removing, free of cost, dirt, ashes, rubbish, ice, snow, and filth from the houses within their district, and compelled the occupier to permit the local authority to remove the soil, dirt, ashes, and filth from his house. That Act contained no definition of house refuse or of trade refuse; but the question was raised indirectly by s. 128, which provided that in case the scavenger was required to remove the refuse of any trade, manufacture, or business, or of any building materials, there should be a settlement as to price. It is unnecessary to deal with the introduction of the expression "building materials." That section has given rise to more than one decision, and in one case, which is of assistance to us, the question was to a large extent the same as it is here. In *Gay v. Cadby* (1) a Court, consisting of Grove J. and Lindley J., decided that ashes arising from coal burnt in the furnace of a steam engine, which was used in the business of pianoforte manufacturers, were the refuse of trade. But for the subsequent criticism of which that decision has been the subject, I should have been of opinion that it was correct; but I do not think that it can stand to its full extent after the views expressed by the Court of Appeal. In any event it would not be a conclusive authority in the present case, although it does decide, if it is still law, that under some circumstances ashes may be trade refuse.

The case in which that decision was criticized, and which has a very direct bearing upon the present case, is *St. Martin's Vestry v. Gordon* (2); it is, indeed, a decision in regard to the same hotel. That was a very strong case indeed, and the decision limited the meaning of the words "trade refuse"; I cannot say that it held the refuse in that case to be house refuse, for that was not the question to be decided under the Act then in force. The question there to be decided was whether clinkers produced in the furnaces of the boilers of a hotel used to generate steam for supplying power for electric light and for warming and cooking were refuse of trade, so that the local authority

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(1) 2 C. P. D. 391.

(2) [1891] 1 Q. B. 61.

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could require payment for removing them. So far as engines for electric lighting are concerned, a very strong argument might be made against their refuse being house refuse, because, although there are no doubt houses which manufacture their own electric light, the majority of houses in which electric light is used obtain their supply from a central station. But be that as it may, Lord Esher M.R., in a judgment the reasoning of which applies directly to the present case, distinctly held that the very large quantity of ashes produced by the furnaces of the engines used for the purposes of the hotel was not to be regarded as trade refuse and was not trade refuse within the definition of that expression in s. 128 of the Act of 1855; in other words, the ashes came within the class of stuff which the vestry were bound to remove without payment. It is true that Lindley L.J. adhered to the view that he had previously taken in *Gay v. Cadby* (1), and thought that that decision was right, but Lord Esher M.R. and Lopes L.J. do not seem to have been of that opinion. It is unnecessary for us to say what is the true view with regard to *Gay v. Cadby* (1), but the more recent decision is strongly in favour of the respondents' contention. With regard to the distinction which we have been pressed to draw, namely, assuming *St. Martin's Vestry v. Gordon* (2) to be good law, that the definition clause in the Act of 1891 is to be construed so as to impose upon the person carrying on such an undertaking as the present the duty of separating from the bulk so much of the refuse as is trade refuse, although the common aggregation is the same sort of refuse as that ordinarily produced in houses, I think that such a distinction cannot properly be drawn by this Court. For these reasons I think that the refuse which the appellants declined to remove except upon payment was house refuse, and that the respondents are entitled to our judgment.

I am glad to know that in the second case, which raises the same question under s. 33 of the Act of 1891, an appeal can be brought so that the matter can receive further consideration; the present case being stated in a criminal proceeding, there is of course no right of appeal, but in the other case an appeal will lie with leave, and that leave we shall of course grant if desired.

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DARLING J. I am of the same opinion. The case is a difficult one, and I think it so because it was practically impossible for the statute to give a precise definition of what is house refuse and what trade refuse, and therefore no attempt was made to do so. From the description given in the special case it is obvious—indeed, it is found by the learned magistrate—that the refuse which the appellants refuse to remove was indistinguishable in its origin, appearance, and constitution from the ordinary refuse of any large house or series of houses under one roof. I think, therefore, that it is house refuse in the sense that it is the kind of thing which must necessarily be produced by the ordinary use of a house for the purpose of living, eating, and sleeping in it, and inhabiting it as a house is commonly inhabited. That the refuse was larger in quantity than that from an ordinary house is due to the fact that the house was much larger than an ordinary house, and was, in fact, a series of compartments; but in character it seems to me to be properly described as house refuse, because it was produced by the use of a house in the way in which a house is ordinarily used. To my mind trade refuse is something different from that; but in what the difference consists it is not possible to say with exactness, because trades differ amongst themselves. In some trades there is necessarily refuse in the course of the manufacture of an article, as in the manufacture of the substance from which aniline dyes are subsequently produced; sometimes the refuse so produced is valuable, sometimes not. Many trades might be specified where the refuse differs in different ways. In my opinion the Legislature did not intend to give anything like an exhaustive definition of trade refuse; and I think it is sufficient to say that trade refuse must be refuse which is produced in the doing of something different from the occupation of a house as a house is ordinarily occupied, and that house refuse is not converted into trade refuse by the mere fact that the people who occupy the house and buy the food and the coal for the fires for the purpose of carrying on the house are running the house as a hotel. It is perhaps not easy to give a scientific reason for this distinction, and I can only say that I think that the Legislature intended to distinguish between these two kinds of refuse, that they could not possibly

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have found language in which they could have given an exhaustive definition of them, and that the language which they have in fact used results in the definition to which I have endeavoured to give effect.

BRAY J. I am of the same opinion, though no doubt the point is not an easy one to decide. I think it desirable to make a few observations on the case of *St. Martin's Vestry v. Gordon* (1), because in one point of view that decision is a strong authority in favour of the respondents, while in another point of view it is not an authority at all. In that case the Court was dealing with a different statute, and in my opinion it is very dangerous to take a decision giving a certain construction to the language of a particular statute, and when construing another statute in another case, and finding only a slight difference between the language of the two, to draw the inference that no different construction was intended by the legislature. The danger of doing so in such a case as the present appears very clearly from the judgment of Lord Esher M.R. in *St. Martin's Vestry v. Gordon* (2), in which he says, after referring to s. 125: "Now it cannot be denied that what the vestry were required to remove in this case were ashes, and therefore were within the terms of the section, unless there be some subsequent provision which limits the effect of those terms. We are bound to give full effect to the ordinary meaning of the words, unless we find something in another part of the Act which compels us to limit such meaning." Again, when dealing with the provisions of s. 128 as to the removal of trade refuse, Lord Esher says: "This enactment only applies in case any scavenger is required by the owner or occupier to remove the matters in question. It is obvious, as it seems to me, that it cannot apply to matters which the vestry are bound to remove"—that is, under s. 125—"whether required to do so or not. . . . I think the section contemplates different matters from those mentioned in s. 125." In other words, Lord Esher says that he must construe s. 125 first, unless he can see that it is limited by s. 128.

Now the reasoning to which I have just referred does not apply

(1) [1891] 1 Q. B. 61.

(2) [1891] 1 Q. B. 61, at p. 64.

to the statute upon which the present case depends, for there is a definition of "house refuse," and that expression now "means ashes, cinders, breeze, rubbish, night-soil and filth, but does not include trade refuse." Trade refuse is therefore expressly excluded, and we must consider what that term means before arriving at the meaning of house refuse, whereas under the previous statute it was necessary first to see the meaning of house refuse before one could see what trade refuse meant. We must therefore consider the present statute independently of the earlier one, and if we take the definition of trade refuse, we find that it means "the refuse of any trade, manufacture, or business, or of any building materials." Now the argument for the appellants is that that definition means that trade refuse is refuse which comes into being from, or arises as the consequence of, a trade, manufacture, or business which is being carried on. In my opinion that is not the proper meaning of this definition; they are not the words used, though they might have been used if that was the meaning which the Legislature intended. It is not the natural meaning of the language of the Act, and I think that its adoption would, as was pointed out in *St. Martin's Vestry v. Gordon* (1), lead to many absurdities. For instance, in the case of a merchant's office, it might be contended that it was necessary for the carrying on of the business that the rooms should be warmed, and that the ashes arose from the carrying on of the business; and the same contention could be made in the case of a solicitor's office. Why, too, should not the ashes of the grate in the case of a boarding-house keeper or of a lodging-house keeper be trade refuse? Then there would be the same difficulty in the case of the ordinary shopkeeper, for the ashes from the grates in the living rooms might be house refuse, and those from the shop trade refuse. I think, therefore, that we cannot adopt that construction of the Act, although it is to some extent that which was put upon the language of the previous Act by Lord Lindley. I agree with the interpretation suggested by Lord Esher, not because I adopt his reasoning, but because I regard the words of the statute. That learned judge says, in the judgment to which I have already referred: "The expression used

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is altogether new. It is 'refuse of a trade, manufacture, or business.' It is not 'dirt, 'ashes, rubbish, &c., caused by any trade, manufacture, or business'; nor is it 'any refuse, the result of any trade, manufacture, or business.' I think that 'refuse of a trade, manufacture, or business' is a known business term, and means something different from the things which are contemplated by the preceding sections." I adopt that view, and, having arrived at that conclusion as to the interpretation of the definition, it is not difficult to arrive at the proper result of the present case; for if that be the true construction of the Act of 1891, as it was held to be of the Act of 1855, it is not possible to say that cinders from the furnaces of engines used to supply the electric light and the different machinery in this hotel are house refuse, and yet that the ashes of the grates, the peelings of the potatoes, and the remains of the crockery are not house refuse, but trade refuse. So that, when we have once arrived at the true construction of the statute, the case of *St. Martin's Vestry v. Gordon* (1) is conclusive and is binding on us, and we can only hold that this refuse is not trade, but house, refuse. Independently of that decision, I should have arrived at the same conclusion. In my opinion the definition in the statute relates rather to the nature of the refuse than to its origin; and as the magistrate has found that this refuse is in all respects of the same nature as the refuse of an ordinary house, it is house refuse so far as its nature is concerned. Then is a hotel a house? It is clear that it is, not because of the definition of "house" in the Act of 1891, but because it is a house in fact, both in regard to its structure and to its use. For these reasons I am of opinion that this refuse was house refuse, and that the decision of the magistrate was right.

*Appeal dismissed.*

Solicitors for appellants: *Allen & Son.*

Solicitors for respondents: *Stanley, Woodhouse & Hedderwick.*

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## TAYLOR v. METROPOLITAN RAILWAY COMPANY.

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April 24, 25.

*Railway—Rates—Inequality of Charge—Railways Clauses Act, 1845 (8 & 9 Vict. c. 20), s. 90—Money paid to Agent under mistake of Fact—When recoverable back.*

The plaintiff contracted with the M. Railway Company for the carriage of coke breeze from a station on the M. Railway to a station on the defendants' railway at a certain specified through rate per ton. The goods having been delivered, the plaintiff paid for the carriage at the agreed rate to the defendants as the collecting agents of the M. Railway Company. The plaintiff subsequently discovered that the M. Railway Company had in their published book of rates a through rate between the same stations charging a less sum per ton for coke breeze if used for fuel purposes. The coke breeze carried for the plaintiff was intended to be used for other than fuel purposes. The plaintiff sought to recover from the defendants the difference between the two rates, upon the ground that differential charges for the carriage of the same article according to the purposes for which it was used were a breach of the provisions of s. 90 of the Railways Clauses Act, 1845, which requires "that all such tolls be at all times charged equally to all persons and after the same rate . . . in respect of all . . . goods . . . of the same description conveyed . . . over the same portion of the line of railway under the same circumstances." There was no evidence that the M. Railway Company had in fact ever carried coke breeze for fuel purposes at the lower rate for any particular persons, but the lower rate had been in existence as a published rate for several years, including the whole period covered by the transactions with the plaintiff. The payments by the plaintiff to the defendants had been made voluntarily and without compulsion. Before any notice to the defendants of any claim by the plaintiff that he had been overcharged they had settled in account with the M. Company in respect of the payments so received by them on the M. Company's behalf:—

*Held*—(1.) That, assuming s. 90 to apply to the case of carriage at a through rate over more than one railway, as to which the Court expressed no opinion, it was necessary, in order to establish an inequality of rates under that section, to shew that some persons had in fact been charged at the lower rate, and that of that the existence of the lower rate upon the rate book was no evidence.

(2.) That, even if there was a breach of that section, the money could not be recovered back from the defendants, who had received it as innocent agents and settled for it with their principals before any notice of the overcharge; and that this applied equally to that portion of the money received by them, which, in the ordinary course under their traffic arrangement with the M. Company, they would be entitled



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to retain to their own use as representing their share of the through rate for the portion of the transit over their railway, the money having been paid by the plaintiff as a lump payment under a contract to which the defendants were not parties.

APPEAL from the Marylebone County Court.

The plaintiff, a coal merchant at Rickmansworth, had contracted with the Corporation of Birmingham for the purchase of coke breeze. In December, 1900, being desirous of having some of the coke breeze sent to him at Great Missenden, on the Metropolitan Railway, he obtained from the Midland Railway Company a quotation of 7s. 1d. per ton as a through rate from Birmingham to Great Missenden, and from time to time during the years 1901—1903 coke breeze was sent to that station, and the carriage was paid for by the plaintiff at that rate. The payments were in the ordinary course collected by the defendants as agents for the Midland Railway Company. The plaintiff was not compelled to pay for the carriage before getting delivery of the goods, but was allowed to take them without payment at the time, and the charge was carried to a current account which was settled later on. The whole of the payments so made by the plaintiff were, as the judge found, paid over by the defendants to the Midland Railway Company, or settled for in account with that company, previously to March, 1904, and without notice that the plaintiff had been overcharged. In March, 1904, the plaintiff discovered that the Midland Railway Company had in their published book of rates a through rate from Birmingham to Great Missenden of 6s. 6d. per ton "for coke breeze for fuel purposes," and he made a complaint that he had been overcharged to the extent of 7d. per ton. It was assumed for the purposes of the case that the 6s. 6d. rate had been in existence as a published rate from a date antecedent to the commencement of the plaintiff's transactions, but there was no evidence that coke breeze had ever in fact been carried at that rate for any particular person. The coke breeze sent for the plaintiff to Great Missenden was intended for a customer of the plaintiff, a brickburner, and was intended to be used in the process of brick-making, the breeze being mixed in the shape of dust with the clay, and also being laid between the layers of bricks in the kiln.



The plaintiff sued the defendants in the county court to recover the sum of 5*l.* 17*s.* 9*d.*, being the amount of the alleged overcharge of 7*d.* per ton on the total amount of the coke breeze carried, and contended that, having regard to the purpose for which it was used, it came under the head of coke breeze for fuel purposes, and was entitled to be carried at the lower rate. The judge held that the coke breeze in question was not used for fuel, but he also held that to charge differential rates for the carriage of the same article when used for fuel and when used for brickmaking involved an inequality of rate which could not be justified, and that the plaintiff was entitled to be repaid by the defendants the whole of the overcharge made. The defendants appealed.

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*C. A. Russell, K.C.*, and *Dalrymple*, for the defendants. The county court judge purported to act upon s. 90 of the Railways Clauses Act, 1845 (1), but that section only applies to a case where the whole transit is upon one railway; it has no application to the case of a through rate for a carriage over more railways than one: *Hull, Barnsley, &c., Ry. and Dock Co. v. Yorkshire and Derbyshire Coal and Iron Co.* (2) It relates throughout to the tolls to be taken upon "the railway," and by s. 3 "the expression 'the railway' shall mean the railway and works by

(1) By s. 90 of the Railways Clauses Act, 1845: "Whereas it is expedient that the company should be enabled to vary the tolls upon the railway so as to accommodate them to the circumstances of the traffic, but that such power of varying should not be used for the purpose of prejudicing or favouring particular parties, or for the purpose of collusively and unfairly creating a monopoly, either in the hands of the company or of particular parties; it shall be lawful, therefore, for the company, subject to the provisions and limitations herein and in the special Act contained, from time to time to alter or vary the tolls by the special Act authorized to be taken, either upon the whole or upon any

particular portions of the railway as they shall think fit; provided that all such tolls be at all times charged equally to all persons and after the same rate, whether per ton per mile or otherwise, in respect of all passengers, and of all goods or carriages of the same description, and conveyed or propelled by a like carriage or engine, passing only over the same portion of the line of railway under the same circumstances; and no reduction or advance in any such tolls shall be made either directly or indirectly in favour of or against any particular company or person travelling upon or using the railway."

(2) (1887) 18 Q. B. D. 761.

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the special Act authorized to be constructed"—in this case the Midland Railway. But the 7s. 1d. was not a charge made "for using the railway" in that sense; it was a through rate to cover carriage over the Metropolitan Railway as well.

Secondly, the section only deals with a case in which a higher rate is charged to one person than to another in respect of carriage "over the same portion of the line of railway under the same circumstances." Blackburn J., in giving his opinion to the Lords in *Great Western Ry. Co. v. Sutton* (1), said: "I think it would be necessary to shew that there was a practice of carrying for some person or class of persons at the lower rate. But a single instance would be evidence to prove this practice." Here no evidence was given of a single case of coke breeze having been actually carried from Birmingham to Great Missenden for any person at the lower rate. It is true that the Midland Company had a lower rate upon their rate book at which they offered to carry coke breeze for fuel between those points. And it is conceded that there is no justification for making a higher charge for coke breeze used for one purpose than for coke breeze used for another purpose. But a mere paper rate is not enough. It must be shewn that it was adopted in practice.

Thirdly, even if there was a breach of s. 90, still the overcharge cannot be recovered from the defendants. The plaintiff has sued the wrong parties. The defendants merely received the money as collecting agents for the Midland Company. No doubt "an action for money had and received lies to recover back money which has been obtained through compulsion, even though it has been received by an agent who acted for his principal": *Parker v. Bristol and Exeter Ry. Co.* (2) But here it was conceded there was no compulsion. The plaintiff paid it voluntarily. Under those circumstances the only ground on which the money could be recovered back would be that it was still in the defendants' hands, or that they had paid it over to their principals after notice of the plaintiff's claim. But here the evidence shewed that before any notice of the existence of the Midland Company's lower rate or of any claim by the plaintiff that he had been overcharged, the

(1) (1869) L. R. 4 H. L. 226, at p. 239.

(2) (1851) 6 Exch. 702.

defendants had settled with their principals in account, and that is equivalent to payment. Of course, a portion of the money received by the defendants from the plaintiff ultimately went into their pocket as a remuneration for the portion of the carriage that took place on their railway. But the plaintiff is not entitled to recover any part even of that money. For the payment by the plaintiff was a lump payment for a through rate, the whole of which was received by the defendants on account of their principals; and any private arrangement between the Midland Company and the defendants as to allowing the latter to retain a portion of the money to their own use was a matter with which the plaintiff had no concern.

*Freeman*, K.C., and *W. E. Ball*, for the plaintiff. The defendants' construction of s. 90 of the Act of 1845 is too narrow. The use of the words "the railway" was not intended to exclude from the operation of the section traffic carried upon another line. If the defendants' contention is right, and if the only remedy for inequality of treatment in the case of a through rate is an application to the Railway Commissioners, in all cases in which the amount of the overcharge was small the wrong would go unremedied, for proceedings before the Railway Commissioners would be too costly. This result can never have been intended.

Upon the question whether the rates had in fact been charged unequally to different persons between these two stations, surely the fact that there was a published rate at the lower figure, which had been admittedly on the rate-book for some years, was some evidence that persons had in fact been charged at that lower rate, especially as the subject-matter was such a common article of commerce as coke breeze. Moreover, it is doubtful whether there is any necessity at all to shew actual carriage at the lower rate; it is probably sufficient to shew that the railway company held themselves out in their published rate-book as ready to carry for a particular class of persons at a lower rate. There is nothing in Blackburn J's. opinion in *Sutton's Case* (1) to negative this. He was there dealing with the case of a company carrying for certain customers at a lower rate secretly, and in

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contradiction of its one published rate, and in such a case he held that in order to establish a breach of the section it was necessary to shew that the company made a practice of doing what was complained of. Here there was no secrecy at all; they held themselves out as at all times ready to carry at differential rates.

As to the right to recover back the overcharge, assuming there was a breach of s. 90, it is contended that, even if the defendants had settled the account with the Midland Company before notice of any claim of overcharge, the defendants are not protected in respect of their own share of the profits of the through carriage, which must be treated as money of the plaintiff still in the defendants' hands.

*Russell, K.C.*, in reply.

KENNEDY J. The plaintiff in this case sued in the county court to recover back from the defendants a sum of 5*l.* 17*s.* 9*d.*, which he claimed that he had been overcharged in respect of the carriage for him of certain coke breeze from Birmingham, on the Midland Railway, to Great Missenden, on the defendants' railway. The transactions in respect of which the claim was made had extended over some years. The plaintiff had previously inquired of the Midland Railway Company what their rate would be for the carriage of coke breeze between those two stations, and was informed that it would be 7*s.* 1*d.* per ton. And he from time to time as the goods were delivered to him at Great Missenden paid to the defendants, as the agents to collect the rates on behalf of the Midland Company, for the carriage of the same at the rate of 7*s.* 1*d.* per ton. The coke breeze in question was intended to be used by the person for whom the plaintiff had bought it for the purpose of brickmaking. And subsequently to the payment of the rates to the defendants he discovered that the Midland Railway Company had two rates for the carriage of coke breeze from Birmingham to Great Missenden, namely, 6*s.* 6*d.* per ton if it was intended to be used for fuel and 7*s.* 1*d.* per ton if it was intended to be used for other purposes. In the county court the main question upon which the case was fought was whether, having regard to the particular use to which this coke breeze was intended to be put, it could be said to be coke



used for fuel. The judge found as a fact that it was not intended to be used for fuel, and that consequently the 7s. 1d. rate would be the one applicable. But he went on to decide a matter of law which had not been fully discussed before him—that the charging of different rates for the same thing according to the use to which it was intended to be put was a contravention of s. 90 of the Railways Clauses Act, 1845, which requires that the rates should be charged equally to all persons in respect of goods of the same description carried over the same part of the railway under the same circumstances; and on that ground he gave judgment for the plaintiff. It has now been contended on behalf of the defendants, on appeal from that decision, that the case does not fall within s. 90 at all, inasmuch as the goods were carried over the lines of more than one railway company. Mr. Russell argued that under no circumstances could a through rate involving carriage over two or more railways be made the basis of an action to recover back payments under that section. As at present advised I am not satisfied that that contention is sound, but under the circumstances it is not necessary to decide that point, because it seems to me that there was no evidence given at the trial to establish the inequality of charges of which the plaintiff complains. In my view it is not sufficient to shew that the railway company had in their books a rate, which they call “the rate in force,” in the sense that it was the charge that they were prepared to make for the carriage between these two stations of coke breeze used for fuel. It lay upon the plaintiff to shew that goods of that description had in fact been carried for some customer at the lower rate during the period of the payments now sought to be recovered back. And of that the mere existence of such a rate in the company’s rate-book is, in my opinion, no evidence. In giving his opinion in the House of Lords in *Great Western Ry. Co. v. Sutton* (1) Blackburn J. said: “When it is sought to shew that the charge is extortionate, as being contrary to the statutable obligation to charge equally, it is immaterial whether the charge is reasonable or not; it is enough to shew that the company carried for some other person or class of persons at a lower charge during the period throughout which the party

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(1) L. R. 4 H. L. 226, at p. 239.



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complaining was charged more under the like circumstances. One single act of charging a person less on one particular occasion would not, I think, make the higher charge to all others extortionate during all that day, or week, or month, or whatever the period might be. I think it would be necessary to shew that there was a practice of carrying for some person or class of persons at the lower rate. But a single instance would be evidence to prove this practice; and if followed up by shewing that the smaller charge was repeatedly made at intervals over a period of time, the jurors would, in the absence of explanation, be justified in drawing, and would probably draw, the inference that the company during the period carried for others at that lower rate, and consequently that the higher charge was extortionate as being beyond the statutable limit of equality." He evidently meant that the company must be shewn to have in fact carried goods for some customer or customers at the lower rate, and of that there is no evidence here.

The other point that Mr. Russell contended for was that, assuming that there was a breach of the equality clause and a right to recover the money from someone, still it could not be recovered from the defendants, because the defendants in receiving the money merely acted as agents for the Midland Company, with whom the contract was made, to collect the rates payable under that contract, and, before notice of any overcharge, had paid over the money to the Midland Company. The defendants, as the judge found, were merely innocent agents in the matter: they did not fix the rate, they did not exercise any compulsion on the plaintiff to pay it, he paid it voluntarily, and the defendants had, as I understand the judgment, long since settled the matter with their principals; and though the judge does not set out in his note the evidence upon which that latter finding as to the payment over to the Midland Railway Company was based, we must assume, as the statement was not challenged, that he had evidence to support it. No doubt where an agent refuses to deliver goods to the person demanding delivery of them except upon the payment of a sum which his principal is not entitled to receive, and the money is paid to him under protest, it may be recovered back. But that is not the case here.

There was no suggestion of any duress ; the money was voluntarily paid. But then it is said that the plaintiff paid it voluntarily only because he was labouring under a mistake of fact, being in ignorance that the charge was excessive, and could not be legally enforced. With regard to that, it is no doubt true that, as was said by Blackburn J. in *Pollard v. Bank of England* (1), "Where money has been paid under a mistake of fact to an agent, it may be recovered back from that agent, unless he has in the meantime paid it to his principal or done something equivalent to payment to him, in which case the recourse of the party who has paid the money is against the principal only." But here the county court judge, as I understand his judgment, has found that at the time when the defendants first received notice of the plaintiff's claim of overcharge they had long since settled with the Midland Railway Company. Then it was said that even if that was so, still the defendants would be liable in respect of that portion of the payments which, under their arrangement with the Midland Railway Company, they had retained for their own use. Upon that point I have entertained some doubt, because the money which they were entitled to under that arrangement was not in the nature of a commission or reward for their agency, but a proportion of the through rate due to them in respect of that part of the transit which was upon their railway. On the whole, however, I do not think the defendants are liable to refund even that part of the money paid to them. The payment was a lump payment under a contract to which the defendants were not parties, and any profit-sharing arrangement made between the Midland Railway Company and the defendants was a matter with which the plaintiff was not concerned, and did not confer upon him any right of action against the defendants. I think the appeal must be allowed.

A. T. LAWRENCE J. I am of the same opinion. The county court judge held that to charge a man who is going to use coke breeze for the purpose of brickmaking a higher rate of

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(1) (1871) L. R. 6 Q. B. 623, at p. 630.

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carriage than is charged to a person who requires coke breeze for the purpose of fuel involves an inequality of charge which is not allowed by the Act of Parliament. It has not been suggested that in so holding he was wrong, but it is said that it was not sufficiently brought to his attention that there are facts here which disentitle the plaintiff to recover even though that be good law. I do not know that I agree with Mr. Russell's first argument as to the inapplicability of s. 90 to a case of carriage at a through rate over more than one railway. It may be right, but I express no final opinion upon it. His second contention, however, I think was sound, namely, that it must be shewn that there were other persons who were in fact charged for the same service at a lower rate. I think that that is clear, not merely from the words of the section, but also from the judgment of Blackburn J. in *Great Western Ry. Co. v. Sutton*. (1) Unless you can shew that somebody has been so preferred there is no right to recover money back under the section. And in that respect the plaintiff here has failed to make out his case; he tendered no evidence of such preference. Then there was a third point, that, assuming there to be a breach of the section, the defendants were not the proper parties to be sued. I think Mr. Russell's argument on that point also is right. The defendants received the money as agents for their principals, the Midland Railway Company. Under those circumstances, in order to hold the agents liable, you must shew that they improperly received it. But the county court judge has expressly found that they exercised no compulsion, and were not guilty of any improper conduct in connection with the receipt; and if that be so, the plaintiff can have no right to get the money back unless he can go on to shew that they have not paid the money over, or that they paid it over after they had received notice of the overcharge. That is a fact which the plaintiff must prove, and it is not enough for him to say that there was no proof that they had paid it. The onus lies on him to shew that the money has not yet been paid over or been settled for in account. Here the plaintiff did not prove that; indeed, the county court judge, in his judgment,

(1) L. R. 4 H. L. 226, at p. 239.

assumed the contrary to have been the fact. I think that the defendants are entitled to succeed.

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*Appeal allowed.*

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Solicitors for plaintiff: *Andrew, Wood, Purves & Sutton.*

Solicitor for defendants: *C. de W. Kitcat.*

J. F. C.

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## WILLIAMSON v. DURHAM RURAL DISTRICT COUNCIL.

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May 1.

*Local Government—Sewer—Drain vested before 1894 in Highway Authority not being a Local Authority—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 4—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 25.*

Where before the year 1894 a drain was vested in a highway authority which was not also a sanitary authority, and was consequently not a sewer within the definition in s. 4 of the Public Health Act, 1875, it did not upon the passing of the Local Government Act, 1894, become a sewer by reason of its becoming vested under s. 25 of that Act in a district council which was both a highway authority and a sanitary authority.

CASE stated by justices for the county of Durham.

A complaint was on October 25, 1905, preferred against the appellant under s. 95 of the Public Health Act, 1875, charging that a nuisance arising from a collection of foul sewage was caused by the act of the appellant, and that he had made default in complying with a notice requiring him to abate the same.

The sewage in question came from the appellant's farm buildings, and was discharged by him into a pipe belonging to the respondent council and running under a high road, whence it flowed into a pond and caused the nuisance complained of. The pipe had been laid under the road some time before the year 1894 by the Durham and Chester-le-Street Highway Board, who were at that time the authority having the management of the roads, and it was so laid by them for the purpose of carrying off the surface water from the road and conveying it into the pond. Upon the passing of the Local Government Act, 1894, the said highway board ceased to exist, and the pipe became vested in the respondents under s. 25 of that Act. The appellant contended that the



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pipe was a sewer into which he had a right to discharge his sewage, and that the nuisance was caused, not by his act, but by the default of the respondents in neglecting to dispose of the sewage. The justices made an order requiring him to abate the nuisance.

*Meynell*, for the appellant. Down to the year 1894 it must be conceded that the pipe in question was not a sewer within the definition of that term in s. 4 (1) of the Public Health Act. It was one of the excepted classes of drains, for it was vested in an "authority having the management of roads and not being a local authority," which latter expression is by the same section defined to mean a "sanitary authority." Down to 1894 the highway authority and the sanitary authority were distinct bodies; but by the Local Government Act, 1894, s. 25 (2), the two bodies are merged in one. The pipe consequently has ceased to be within the exception, and the appellant has a right to discharge his sewage into it.

*Macpherson*, for the respondents. The pipe is not a sewer. It is true that the Act of 1894 has vested the control of the pipe in the respondents, who are also the sanitary authority, but it was not intended by that Act to alter the character of the drains the control of which was thereby transferred, or to impose upon the district council a larger duty in respect of them than formerly lay upon the highway authority. When the pipe was laid down it was a drain, and it still remains an excepted drain, into which the appellant has no right to send the offending sewage. The nuisance, therefore, is the result of his act, not of the default of the respondents.

(1) By s. 4 of the Public Health Act, 1875, "'Sewer' includes sewers and drains of every description," except drains as therein defined, and "except drains vested in or under the control of any authority having the management of roads and not being a local authority under this Act."

"'Local authority' means urban sanitary authority and rural sanitary authority."

(2) By s. 25 of the Local Government Act, 1894, "There shall be transferred to the district council of every rural district all the powers, duties, and liabilities of the rural sanitary authority in the district, and of any highway authority in the district, and highway boards shall cease to exist, and rural district councils shall be the successors of the rural sanitary authority and highway authority."



LORD ALVERSTONE C.J. It is admitted that before the year 1894 this pipe was not a sewer. It had been constructed by the authority having the management of the roads for the purpose of carrying away the surface water from the road; and at that time the road authority was not the sanitary authority. The pipe therefore came within the class of drains excepted from the definition of "sewer" in s. 4 of the Act of 1875. Then the question is whether the effect of the Local Government Act, 1894, has been to take the pipe out of the exception and convert it into a sewer. Sect. 25 of that Act no doubt transfers to the district council the powers, duties, and liabilities both of the rural sanitary authority of the district and also of the highway authority. But in my opinion the transfer does not alter the status of any drain then in existence or to oblige the district council to receive thenceforward sewage into a drain which was constructed for a wholly different purpose. The appeal must be dismissed.

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RIDLEY J. I am of the same opinion. If the Legislature had intended to take existing excepted drains out of the exception I cannot help thinking that they would have been more explicit in their language.

DARLING J. I agree.

*Appeal dismissed.*

Solicitors for appellant: *Crump & Co., for G. Aynsley Smith, Durham.*

Solicitors for respondents: *Robbins, Billing & Co.*

J. F. C.

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April 2.

*In re* MELLISON.

*Ex parte* DAY.

*Bankruptcy—Administration of Estate of deceased Debtor—Onerous Property of Debtor—Power of Trustee to Disclaim—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 55, 125.*

Sect. 55 of the Bankruptcy Act, 1883, which gives the trustee power to disclaim onerous property of a bankrupt, applies to the administration in bankruptcy of the estate of a deceased insolvent under s. 125 of the Act.

APPEAL by F. Day from an order of the registrar of the county court at Brighton giving the trustee leave to disclaim a lease.

By a lease dated May 16, 1898, A. J. Isaacs leased the Castle Hotel, Brighton, to J. B. Mellison, for thirty-nine and a quarter years from September 29, 1900, at the yearly rent of 300*l.*; on May 18, 1898, Mellison sub-let the premises to Mrs. Morse for thirty-nine years from September 29, 1900; and on May 19, 1898, Mrs. Morse assigned the sub-lease to F. Day. Mellison died insolvent on April 11, 1905, and an order was made for the administration in bankruptcy of his estate, under s. 125 of the Bankruptcy Act, 1883. (1)

(1) 46 & 47 Vict. c. 52, s. 125 :  
“(1.) Any creditor of a deceased debtor whose debt would have been sufficient to support a bankruptcy petition against such debtor had he been alive, may present to the Court a petition in the prescribed form praying for an order for the administration of the estate of the deceased debtor, according to the law of bankruptcy.

“(2.) Upon the prescribed notice being given to the legal personal representative of the deceased debtor, the Court may, in the prescribed manner, upon proof of the petitioner's debt, unless the Court is satisfied that there is a reasonable probability that the estate will be sufficient for the payment of the debts owing by the deceased, make an order for the administration in bankruptcy of the

deceased debtor's estate, or may upon cause shewn dismiss such petition with or without costs.”

“(5.) Upon an order being made for the administration of a deceased debtor's estate, the property of the debtor shall vest in the official receiver of the Court, as trustee thereof, and he shall forthwith proceed to realize and distribute the same in accordance with the provisions of this Act.

“(6.) With the modifications hereinafter mentioned, all the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act.”

On September 22, 1905, the trustee of the deceased's estate gave notice to the lessor, to Mrs. Morse, and to Day, who was then the tenant in possession of the Castle Hotel, that he intended to disclaim the lease of May 16, 1898. Day then required the trustee to bring the matter before the Court.

The trustee applied to the Court, and on January 18, 1906, the registrar made an order giving him leave to disclaim. Day appealed.

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*Herbert Reed, K.C., and W. O. Hodges*, for the appellant. When the estate of a deceased insolvent is being administered in bankruptcy under s. 125 of the Bankruptcy Act, 1883, there is no power to give the trustee leave to disclaim a lease under s. 55 of the Act. By sub-s. 6 of s. 125 the provisions of Part III. "relating to the administration of the property of a bankrupt," are made to apply to administration under s. 125, "so far as the same are applicable." Part III. comprises ss. 37—65, but it has been decided that some of those sections are not imported into administration. In *In re Gould* (1) it was held that s. 47, as to the avoidance of voluntary settlements, was not applicable; and in *Hasluck v. Clark* (2) it was decided that s. 45, restricting the rights of creditors under executions, did not apply. By s. 10 of the Judicature Act, 1875, rules of bankruptcy were imported into the administration of the estate of a deceased insolvent by the High Court; but it was held that many of the provisions of the Bankruptcy Act were not thereby introduced into administration by the Court: *In re Westbourne Grove Co.* (3); *In re Withernsea Brickworks* (4); *In re Maggi* (5); *In re D'Epineuil*. (6) The effect of those decisions was that s. 10 did not operate so as to alter rights which parties would otherwise have had in an administration by the Court, or to affect the rights of third parties. In administration by the Court there was no right of disclaimer, and it would be a strange result if there can be disclaimer when the estate is being administered under s. 125 of the Bankruptcy Act, 1883, but not if it is being administered in the Chancery

(1) (1887) 19 Q. B. D. 92.

(2) [1899] 1 Q. B. 699.

(3) (1877) 5 Ch. D. 248.

(4) (1880) 16 Ch. D. 337.

(5) (1882) 20 Ch. D. 545.

(6) (1882) 20 Ch. D. 217.

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Division. Disclaimer may seriously affect the rights of third parties, and therefore the provisions as to disclaimer are not introduced into administration under s. 125. The dictum of Cave J. in *In re Gould* (1) was a merely general statement, and was clearly too wide.

*E. E. Humphreys*, for the trustee. The Court has jurisdiction to give leave to disclaim. By s. 125, sub-s. 5, all the property of the deceased debtor vests in the official receiver as trustee, and therefore this lease vested in the trustee; and sub-s. 6 makes applicable all the provisions of Part III. of the Act, relating to administration of the property of the bankrupt, so far as the same are applicable. Sect. 55, which provides for disclaimer of onerous property of a bankrupt, is applicable to administration of the property of a deceased insolvent such as a lease vested in the insolvent. The trustee is bound to administer property of that kind, and he must be entitled to deal with it under s. 55, if necessary. In *In re Gould* (1) Cave J. says that ss. 50 to 57 (excluding s. 52) undoubtedly apply to an administration under s. 125. The decisions upon which the appellant relies all relate to the property of persons other than the debtor, which, by the operation of the law of bankruptcy, would be made part of the estate of the debtor for the benefit of his creditors. This lease was none the less property of the deceased debtor because other persons might be interested.

[He was stopped by the Court.]

*E. Clayton*, for the lessor.

*Reed, K.C.*, replied.

BIGHAM J. The point in this case is whether, in the administration of the estate of a deceased insolvent under s. 125 of the Bankruptcy Act, 1883, the trustee can disclaim a lease, that is, whether the Court has the same jurisdiction to grant leave to disclaim as in bankruptcy. I see no reason why there is not the same jurisdiction, and I think that there is. In 1898 a lease for thirty-nine and a quarter years was granted to the deceased Mellison, who died in 1905. An order for the

administration of his estate in bankruptcy was made under s. 125. That lease then vested in the official receiver, with all the incidents attached to it which would have attached in bankruptcy. Sub-s. 6 of s. 125 provides that, "With the modifications hereinafter mentioned, all the provisions of Part III. of this Act, relating to the administration of the property of a bankrupt, shall, so far as the same are applicable, apply to the case of an administration order under this section in like manner as to an order of adjudication under this Act." I am at a loss to understand why s. 55 of the Act, relating to disclaimer, should not be applicable. By virtue of the order made under s. 125 the lease vested in the official receiver, and I can see no reason why he is not entitled to the same relief as a trustee in bankruptcy. It may be that the rights of third parties will be in some way affected, but that cannot affect the operation of sub-s. 6 of s. 125 as to the property of the deceased. In *In re Gould* (1) and *Hasluck v. Clark* (2) the property in question was not the property of the deceased debtor, and therefore s. 125, sub-s. 6, did not apply. In the present case the lease was part of the estate of the deceased debtor, which vested in the official receiver, and the official receiver became entitled to exercise all the powers and rights of a trustee in bankruptcy in respect thereof. I can see no reason why he should not exercise the right of disclaimer. The dictum of Cave J. in *In re Gould* (3) seems to me to be an authority in point. This appeal therefore fails, and must be dismissed.

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WALTON J. It is clear that this lease vested in the official receiver for the purpose of administration, as part of the estate of the deceased, in accordance with the provisions of Part III. of the Act. No doubt the provisions of s. 55, as to disclaimer, involve dealing with the rights of third parties to some extent, but no more than is necessary for administration in bankruptcy. It is clear that the official receiver is entitled to dispose of this lease in some way or other. If he cannot sell or assign it,

(1) 19 Q. B. D. 92.

(2) [1899] 1 Q. B. 699.

(3) 19 Q. B. D. 92, 95.



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he must be entitled to disclaim it. I agree, therefore, that the decision of the registrar was right.

*Appeal dismissed.*

Solicitor for appellant: *R. W. Beckwith.*

Solicitors for trustee: *Cushman & Clifton, Brighton.*

Solicitors for lessor: *Hyman Isaacs & Lewis.*

W. A.

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April 25,

LONDON COUNTY COUNCIL, APPELLANTS *v.* LONDON,  
BRIGHTON AND SOUTH COAST RAILWAY COMPANY,  
RESPONDENTS.

*Metropolis—River Thames—Prevention of Floods—Flood Works—Alteration of Bank—Repairs—Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879 (42 & 43 Vict. c. cxcviii.), s. 23.*

Sect. 23 of the Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879, provides that if any person make any alteration to any bank of the river Thames so as to affect the security of adjoining premises from flooding, without the previous sanction in writing of the London County Council, he shall be liable to a penalty.

The respondents in the course of and for the purpose of carrying out the duty imposed on them by the Act of repairing a portion of the bank removed certain timbers forming part of the bank in order to replace them by new timbers, and in so doing caused the height of the bank during nine days to be two feet lower than the height sanctioned under the Act. During the progress of the work, flood water flowed through the gap caused by the removal of the timbers, doing damage to adjoining premises. The respondents had not before commencing the work of repair obtained the sanction in writing of the London County Council:—

*Held*, that the respondents had not made an alteration to the bank within the meaning of s. 23, and were not liable to a penalty under that section.

CASE stated by a metropolitan magistrate.

An information was preferred by the appellants against the respondents whereunder the respondents were charged with an offence against s. 23 of the Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879 (1), to wit, for that they did unlawfully and without the previous sanction in

(1) Metropolis Management (Thames River Prevention of Floods) Amendment Act, 1879 (42 & 43 Vict. c. cxcviii.), s. 23: "From and after the passing of this Act, if any person make any alteration to any bank so

writing of the London County Council, and contrary to the said Act, make certain alterations to a certain bank for the protection of land from floods caused by the overflow of the river Thames, namely, the bank at the north side of the wet dock at Deptford Wharf, of which they were the owners, so as to affect the security of certain premises on which the bank was situate, to wit, Deptford Wharf aforesaid and of other premises near thereto, to wit, St. George's Wharf, the Finnish Chapel, and the White Hart public-house in London Road, Deptford, respectively situate, from flooding caused by the overflow of the river Thames, and for that their said offence continued during all the days from and after December 29, 1904, up to and including January 7, 1905, none of the alterations so unlawfully made by them to the bank having been sanctioned during any of the last-mentioned nine days by the London County Council.

It was proved before the magistrate that the respondents were the owners of certain river-side premises known as Deptford Wharf, in the parish of St. Paul, Deptford. Some works were in 1884 ordered by the Metropolitan Board of Works (the predecessors of the London County Council) in pursuance of the Act of 1879 to be carried out so as to form a bank for the protection of lands within the limits of the Act from floods and inundations caused by the overflow of the river Thames. In 1900 the respondents, desiring to construct a new railway and jetty under parliamentary powers, applied for sanction of the alterations involved, and the appellants authorized some deviations from the line of the bank as ordered in 1884, and the bank as altered was constructed and completed. Except as aforesaid all ordinary repairs not involving deviation had been for years continuously carried out by the respondents without reference to

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as to affect the security of the premises upon which the same is situate, or of any other premises adjacent or near thereto, from flooding caused by the overflow of the River Thames, without the previous sanction in writing of the Board, such person shall be liable to a penalty not exceeding ten pounds, and in the case

of a continuing offence to a further penalty not exceeding ten pounds for every day after the first day after the making of such alteration until the same be sanctioned by the Board as aforesaid, or if the same is not so sanctioned, until such bank be restored to its former condition to the satisfaction of the Board."

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the appellants. As a safe and proper prevention of floods or overflow of the river Thames so as to cause damage to any adjoining land the bank, both as originally ordered in 1884 and as sanctioned in 1900, was constructed throughout at a height of eighteen feet above ordnance datum in accordance with the requirements of the Metropolitan Board of Works and the appellants, and under the Act of 1879 the duty of maintaining and repairing the bank at the height of eighteen feet rested upon the respondents.

Behind the Deptford Wharf the land slopes to various levels, in some places six or seven feet below the ordinary river levels at high tide. A part of the bank which respondents were liable to repair and maintain at the level of eighteen feet above ordnance datum consisted for a space of about fifty feet of upright piles driven into the river soil, which piles gave support to and kept in position camp-shedding consisting of planks placed horizontally, the top of the bank being formed by a capping of wooden beams, the upper surface of the beams being eighteen feet above ordnance datum. The level of that part of the wharf which lay behind that part of the bank was about sixteen feet above ordnance datum, or two feet below the top of the timber capping.

On December 30, 1904, there occurred an exceptionally high neap tide, which at about eight o'clock in the evening of that day rose to a height of about 17.44 feet above ordnance datum.

In December, 1904, the respondents considered it necessary to repair the above-mentioned part of the bank and to replace certain old piles and camp-shedding by new piles and camp-shedding in the same or similar positions so as to satisfactorily maintain and repair the bank at that part in pursuance of their liability under the Act of 1879, and for that purpose (during a period of neap tides) they removed certain portions of the timber capping and about two feet in height of the camp-shedding as part of the works involved in the repair and maintenance of the bank at such points. On December 30, 1904, the timber capping and the portion of the camp-shedding about two feet in height had been removed for the purpose of repairs, and the bank was not being maintained between December 29, 1904, and January 7, 1905, at the height of eighteen feet above ordnance datum. There

being no bank above sixteen feet above ordnance datum at the place in question, and no temporary dam having been constructed whilst the repairs were proceeding, as the work was being carried out during neap tides the flood water on December 30 flowed through the gap on to the surface of the wharf and ran along Grove Street to the lower levels in London Road, and caused very serious floodings and damage.

The respondents had not made any communication to the appellants in reference to the work involving the removal of the timber capping and the two feet in height of the camp-shedding of the bank, nor obtained for any of the work the written sanction of the appellants, nor had any plan shewing the intended repairs or of any work affecting the height of the bank been supplied by the respondents to the appellants.

It was contended on behalf of the appellants that the work being done to the bank which left the bank during the said days at a height of only sixteen feet above ordnance datum instead of eighteen feet was an alteration to the bank within the meaning of s. 23 of the Act of 1879; that it affected the security of the adjoining property; that there had been no previous sanction in writing or otherwise given to the work by the appellants; and that the respondents had therefore committed the offence charged. For the respondents it was contended that as they were liable to maintain and repair the bank under s. 22 of the Act of 1879, and as the work being done to the bank was work done in the nature of repair only and the removal of the timber capping and the two feet in height of the bank was necessary in order to carry out the repairs and was not work intended to effect any permanent alteration in the position or construction of the bank, the making of the gap and permitting the gap to continue during the nine days did not amount to an "alteration" to the bank within the meaning of s. 23 of the Act.

The magistrate was of opinion that the contention of the respondents was correct in point of law, and he accordingly dismissed the information.

The question for the opinion of the Court was whether the magistrate upon the above statement of facts came to a correct determination and decision in point of law.

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*Bodkin*, for the appellants. Any work of repair on a bank which may affect the security of the adjoining premises is an alteration within s. 23. The scheme of the Act is that there shall be a central responsible body, which shall have control not only of the original construction and maintenance, but also of any subsequent alteration, of the banks of the river, the object of the Act being the protection of lands from floods. By s. 2 the expression "flood works" is defined to include, amongst other things, "the repairing, raising, strengthening, improvement or removal of any bank," and by s. 5 flood works are not to be executed except in accordance with plans prepared or approved by the Board, now the London County Council. Under ss. 22 and 24 the Board is given the control of the repair of banks, and in order to give full effect to the general scheme of the Act the word "alteration" in s. 23 must include repairs. The reduction of the height of the bank by two feet was in every sense of the word an alteration of the bank, and none the less so because it was only temporary and was done in the course of repairing operations. On the facts here the magistrate should have held that the offence had been committed.

*George Elliott*, for the respondents. The magistrate rightly held that the facts proved did not amount to an "alteration" within s. 23. The section does not mention repairs, and it is submitted that to repair a thing is not the same thing as to alter it.

[He was stopped.]

LORD ALVERSTONE C.J. I have had considerable doubt during the argument of this case as to whether it was not possible to construe s. 23 of this Act in the way contended for by the appellants. It is said on their behalf that the section applies to a case where repairs are done to a bank which has been previously authorized. I think that there is a good deal to be said in favour of that view, but after carefully considering the matter I am not prepared to say that the magistrate has come to a wrong conclusion.

It must be remembered that we are not dealing here with the consequences of a neglect to repair, or of negligent carrying out



a mode of repair. We are dealing with a summons for a penalty under s. 23 for altering a bank. It is true that if one reads into the word "alteration" in s. 23, not the exact words, but words founded upon the definition of "flood works" in s. 2, or if one refers to s. 24 in order to see what are the powers of the appellants with regard to the repair of banks, it is possible that one might come to the conclusion that the section may have been so framed as to include among the offences for which a penalty is to be inflicted what has been done in this case. I think, however, that that is a wrong way of construing a penal section, when one can see, as I think I can, one very clear purpose for which this penal section was inserted in the statute. The object of the statute is to ensure that there shall be protection against floods, and in this particular instance an eighteen feet bank has been determined on as being a sufficient and proper protection. It is quite clear that all the works, including the repair of old banks, the making up of the new bank, the alteration and reconstruction of old banks, and all the other matters which are mentioned in the section which defines "flood works," are to be carried out in accordance with the plans of the London County Council. It seems to me that s. 23 is inserted with a different object altogether, namely, to prevent the unauthorized alteration of the protecting bank in such a way as to affect the security of premises. In my opinion the rest of the Act confirms that view. In the first place there is the very wide definition of the expression "flood works." That wide definition was necessary for the group of clauses which are contained in ss. 5 to 21, under which certain persons have to carry out the flood works; and on their failure to do so themselves, the appellants are empowered to carry them out, and there follows a number of other important provisions for securing that the works shall be properly carried out. Therefore the definition of "flood works" with its consequences, including repairing, was a material and necessary interpretation clause in order to give full effect to the powers of the statute with regard to the execution of works. When we come to maintaining the banks there is imposed in s. 22, on the respondents in this case, amongst other persons, the duty of repairing the banks in accordance with the plans or specifications approved of

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by the appellants, and the section says that they shall have "all and the same powers and be subject to all and the same conditions as are by the preceding provisions of this Act conferred and imposed upon them respectively with respect to the execution of flood works in accordance with plans by the Board." If these proceedings had been instituted under that section I think it would have been plain that if the repairs had not been in accordance with the original design, or not in accordance with any directions given under s. 24, an offence would have been committed; and it is important to notice that that section deals with the particular matter of repairs.

The word "repair" does not appear in s. 23, under which the respondents have been summoned, and if s. 23 meant to impose upon a person whose duty it is to repair a penalty if he executed those works without giving notice, I am unable to understand why the word "repair" should be left out of the section, which follows immediately after the section dealing with repairs, and is followed by s. 24, which also deals with repairs, giving additional powers to the authority. That has led me to the conviction that s. 23, with a special penalty, was inserted for the purpose of dealing with the specific offence mentioned, namely, the alteration from the point of view of safety of a bank which had been previously sanctioned, that is to say, by making it lower than the height which had been previously ordered. In my opinion s. 23 has not touched, and was not intended to deal with, what I may call the temporary removal of a piece of the bank for the purpose of reconstruction. If it had been intended to put upon the persons who are liable to repair the obligation of being subject to a penalty if they touched the bank without obtaining previous sanction in writing, simply because for the purpose of repair it was necessary to put in a new plank for an old one, clearer language should have been used. I therefore think, although I fully feel the weight of the very clear argument which Mr. Bodkin addressed to us, that it was not intended to make this particular conduct of the respondents the subject of a penalty. The appellants have other remedies; they have a civil remedy, and it may be a criminal remedy also, in respect of want of repair or negligence. I think

that the learned magistrate has taken the right view, namely, that the penalty imposed by s. 23 was not intended to be inflicted where the only act done was an act of repair without any alteration of the bank as sanctioned by the authority beyond that alteration which may be possibly described as taking out a piece of the old and putting in new.

This appeal must be dismissed.

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RIDLEY J. I agree. I doubted during the argument, but I have now come to the same conclusion as that which my Lord has so clearly expressed. I quite appreciate the importance, from the point of view of public policy, of preventing any interference with flood works, and I can understand that it may be argued that the word "alteration" in s. 23 of this Act must be read as having a wider meaning than it ordinarily has, and as including repairs. In order to ascertain whether this is so it is necessary to consider the other provisions of the Act, and having done that I have come to the conclusion that the word is not used in that wide sense. The chief argument relied on in support of the contention was that "flood works" are by s. 2 defined to include repairs, and by s. 5 it is provided that flood works are to be executed subject to the approval of the Board of Works, now the London County Council, and are to be in accordance with such plans as they may cause to be prepared. It is contended that, as flood works include repairs, therefore the alteration dealt with by s. 23 must also be executed subject to the approval of the London County Council. I do not think that that is the right way to construe s. 23. No doubt the words "flood works," where they are used, are by the definition section to include the construction and reconstruction, the repairing and raising of banks and so forth; but the Act is not dealing with a river which had never before 1879 been within artificial banks. The words are given this wide meaning with the view of providing better and safer banks, and the necessary work must include repairs as well as construction. That part of the Act which relates to the execution of the necessary works for keeping the river within its banks is to be found in the group of sections Nos. 5 to 21 under the heading "Execution of

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Works." The next part of the Act, relating in the first place to the maintenance of the banks, contains only three sections, of which ss. 22 and 24 relate to repairs and provide that the persons, including the respondents, who are liable to provide for the execution of the flood works, have also to maintain, not the flood works, but the banks. It is quite true that s. 23 is to be found between two sections which are clearly directed to repairs, and therefore, it is argued, the word "alteration" in s. 23 must be read as including repairs. The answer to that argument, which must, I think, prevail, is that that section does not use the word "repair," as ss. 22 and 24 do, but the word "alteration," for I can well understand that whilst the obligation to repair is placed upon the persons who are liable to make and maintain the works, a different provision is required to apply to the case of any person who may choose to make an alteration in those works—that is to say, the Act provides for a system known as the "flood works" system; it is a complete and satisfactory system, and if any person ventures to alter it without due authority, or to do anything to make it different from what it was before, then he is to be liable to a penalty. That is really, as it seems to me, the effect of s. 23. I think that the truth of the matter is that provisions similar to those of s. 23 are to be found in other Acts relating to other rivers, and that it is one of those general provisions deemed necessary by the Legislature in order to prevent unauthorized changes and alterations in flood works which have been constructed for the protection of property. For these reasons I think, though the point is an arguable one, that the decision of the magistrate was right.

DARLING J. I am of the same opinion. By the definition clause the expression "flood works" includes, amongst other things, the alteration of a bank and also the repair of a bank, and because that is so it is argued that the words "alteration of any bank" in s. 23 mean the same as "flood works." I do not think that those words have at all the same meaning. A wrong-doer damaging a bank could not, in my opinion, rightly be said to be doing "flood works." I think that the construction



of the section contended for by Mr. Bodkin is not a logical one. It seems to me that an urgent repair, such as those in question in this case, a mere repair of an existing barrier against the water, because it has become defective owing to time, is not an alteration within s. 23. I think that if the Legislature had meant a matter of that sort to be an alteration they would have said so by using one of the words which are used several times in the earlier part of the Act, the appropriate word, of course, being "repair."

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*Appeal dismissed.*

Solicitor for appellants: *Seager Berry.*

Solicitors for respondents: *Rose & Co.*

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SIVEWRIGHT, APPELLANT; ALLEN, RESPONDENT.

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*April 25, 26.*

*Ship—Seaman—Wages—Termination of Service—"Loss of Ship"—Capture—Destruction—Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 158.*

A British seaman on March 10, 1905, signed articles for service on a British ship for a three years' voyage in certain specified latitudes, including Japan, Manchuria, and Siberian ports. At that date a state of war existed between Russia and Japan. On May 18, 1905, the ship while proceeding through the China Sea and approaching the Straits of Formosa was captured by a Russian cruiser, and was on June 2, 1905, destroyed by the Russians. Her crew, who had been previously taken on board another Russian ship, were subsequently sent back to London. There was no evidence of what the cargo of the British ship consisted, nor that her capture by the Russians was justified:—

*Held*, by Lord Alverstone C.J. and Ridley J., that the capture of the ship, coupled with the fact of her subsequent destruction, constituted a "loss" of the ship within s. 158 of the Merchant Shipping Act, 1894, whereby the seaman's service was terminated on June 2, 1905.

*Held*, by Darling J., that there was a "loss" of the ship at the date of her capture.

CASE stated by one of the stipendiary magistrates for the city of Manchester upon the hearing of a summons taken out on September 14, 1905, by the respondent, a seaman, under s. 164 of the Merchant Shipping Act, 1894, claiming (inter alia) wages



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from March 23, 1905, to that date in respect of his services on board the steamship *Oldhamia*, of which the appellant was the owner. (1) The following facts were proved or admitted before the magistrate :—

On March 10, 1905, at New York, the respondent signed on the articles of the British steamship *Oldhamia*, of which the appellant was the owner. By the articles of agreement the respondent agreed to serve on board the *Oldhamia* as an able-bodied seaman at the rate of 4*l.* per month, on a voyage of not exceeding three years' duration to any ports or places within the limits of 75 degrees north and 60 degrees south latitude, to end at such port in the United Kingdom or continent of Europe (within home trade limits), as might be required by the master, Japan, Manchuria and Siberian ports included. The articles contained the following clause :—“ If the above trading ends from any cause except wreck, or if such time expires while the vessel is abroad and not bound direct for the United Kingdom or Continent, as stated, the crew agree to ship in any other British vessel provided by the master (bound direct for the United Kingdom or Continent) at not less than the same rate of wages. . . . ”

At the time the articles were signed a state of war existed between Russia and Japan.

The *Oldhamia* left New York on March 26, 1905, and her first port of call was stated to be Hong Kong for orders. There was no evidence of what the cargo of the *Oldhamia* consisted, nor that her capture by the Russians, as hereinafter mentioned, was justifiably made, nor that her destination was to any belligerent port. The appellant did not, in fact, know of what her cargo consisted or the destination of the ship beyond Hong Kong.

On May 18, 1905, the *Oldhamia* was proceeding through the China Sea, and, when north of Hong Kong and approaching the Straits of Formosa, was captured by the cruiser *Oleg*, belonging to the Russian Baltic Fleet. The crew attached to the *Oldhamia*,

(1) There were also claims by the respondent for continuing wages, costs of lodging and maintenance, and compensation. These were dis-

allowed by the magistrate, and the case raised no question as to his decision with regard to them.

including the respondent, were taken on board the Russian cruiser *Dnieper*, and the *Oldhamia* steamed away, being manned at that time by a Russian prize crew. The *Oldhamia* was destroyed by the Russians on June 2, 1905, as appeared by the Board of Trade certificate. On June 5, the respondent was landed at Swatow, taken thence to Hong Kong, where he remained for forty days, and he was finally sent to England as a distressed seaman, arriving in London on September 5, 1905.

The respondent claimed wages from March 23 to September 14, 1905, the date of the issue of the summons. It was admitted that wages were due up to May 18. On behalf of the appellant it was contended that the respondent's right to wages terminated with the capture of the *Oldhamia* on May 18, 1905, she then being lost within the meaning of s. 158 of the Merchant Shipping Act, 1894 (1), or at the latest on June 2, 1905, when the vessel was destroyed.

The magistrate held that the *Oldhamia* had not been lost within the meaning of s. 158, and that the respondent was entitled to wages up to September 5, 1905, the date of his arrival in London.

The question for the opinion of the Court was whether the magistrate was right in so holding.

*J. A. Hamilton, K.C.*, and *Dawson Miller*, for the appellant. The appellant, through no fault of his own, was by a maritime misadventure totally deprived of the use and possession of his ship. That is sufficient to bring the case within s. 158. The word "loss" in that section is not confined to matters ejusdem generis with "wreck," but the two words together cover every kind of marine peril by which an owner may be deprived of his ship. The circumstances of the seizure of this ship amount to

(1) The Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), s. 158: "Where the service of a seaman terminates before the date contemplated in the agreement, by reason of the wreck or loss of the ship, or of his being left on shore at any

place abroad under a certificate granted as provided by this Act of his unfitness or inability to proceed on the voyage, he shall be entitled to wages up to the time of such termination, but not for any longer period."

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a capture; it was no doubt unjustifiable, being analogous to a capture by pirates; but even an unjustifiable capture has always been held to be covered by a policy of marine insurance against loss by perils of the seas, and there is nothing in the language of s. 158 to shew that the word "loss" in the section does not apply to a loss of that kind. The magistrate may have been misled by a passage in the judgment in *Austin Friars Steam Shipping Co. v. Strack* (1), where Ridley J. said: "It seems to us very doubtful whether the word 'loss' would in any case include a capture such as this, which is not in the same category as wreck, fire or stranding, or such terminations of a voyage as are brought about by the perils of the seas." It is submitted that that passage is merely an obiter dictum, and that the view there expressed as to the meaning of the section is too narrow. [*Sibery v. Connelly* (2) and *The Woodhorn* (3) were also cited.]

*Evans, K.C.*, and *M. Morgan*, for the respondent. The decision of the magistrate was right. The word "loss" in s. 158 does not include capture, but, as was pointed out in *Austin Friars Steam Shipping Co. v. Strack* (1), only matters in the same category as wreck, fire, or stranding. If the wider meaning contended for by the appellant is the correct one, it was unnecessary to insert the word "wreck" in the section, for, according to the argument for the appellant, "loss" would clearly include "wreck." The expression "wreck or loss of the ship" also occurs in s. 157, where the context shews that "loss" can only be something ejusdem generis with "wreck." The subsequent destruction of the vessel must be regarded as an incident of the capture, and cannot operate to cause that capture to become a loss, which otherwise it would not have been. Further, the provision in the articles of agreement as to transferring the crew to another ship if the trading ended from any cause except wreck shews that the intention of the parties was that the wages of the crew were only to cease in the event of the wreck of the ship.

[They referred to *Lloyd v. Sheen*. (4)]

*Hamilton, K.C.*, replied.

(1) [1905] 2 K. B. 315.

(2) (1905) 94 L. T. 198.

(3) (1891) 92 L. T. Journ. 113.

(4) (1905) 93 L. T. 174.

April 26. LORD ALVERSTONE C.J. This case raises an important, and to some extent a novel, question under s. 158 of the Merchant Shipping Act, 1894, which is in substantially the same terms as s. 185 of the Act of 1854. The question which we have to decide is whether the service of the respondent on board the steamship *Oldhamia* terminated by reason of there having been a loss of the vessel within the meaning of s. 158. The facts are that on May 18, 1905, the ship, being then on a voyage from America to Hong Kong, was captured by a Russian cruiser; the crew were taken off, and on June 2 she was destroyed by the Russians. The vessel was not carrying contraband of war, and nothing had been done by the owner which would give the seaman the right to say that his contract had been broken by the direct action of the owner or by conduct on his part which would justify the seaman in refusing to continue the venture. The appellant now claims wages under s. 164, which, it is admitted, would entitle him to be paid his wages up to the time of his arrival in England but for the protection, if any, afforded to the owner by s. 158. Before I proceed to consider that section I will refer to a point which has been argued as to the effect of a clause in the agreement of service which provides that if the voyage ends from any cause except wreck the owner may provide another ship for the crew. It is contended for the appellant that under that clause there was an implied obligation on the respondent in the circumstances which happened to provide the appellant with employment on another ship. I do not think that clause touches the question here, where the adventure was not terminated by any act of the owner.

Now, turning to s. 158, we have to put a construction on the words "wreck or loss." The magistrate seems to have acted on a passage which occurs in the judgment in *Austin Friars Steamship Co. v. Strack* (1), where Ridley J., in delivering the considered judgment of the Court, said: "It seems to us very doubtful whether the word 'loss' would in any case include a capture such as this, which is not in the same category as wreck, fire or stranding, or such terminations of a voyage as are brought about by the perils of the seas." But when one considers the rest of

(1) [1905] 2 K. B. 315.



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the judgment and the nature of the question with which the Court was dealing in that case, I think that it is impossible to regard that passage as having been intended as an exhaustive statement of every cause which may constitute a loss within the section. I think that passage only means that *prima facie* the matters there enumerated would be within the words. I do not propose to attempt to give an exhaustive definition of the meaning of the word "loss" in s. 158. It is quite plain that there is one common case of loss, which is included, namely, loss by fire, and I do not doubt that there may be many others; but I am not prepared to go so far as was contended for in the argument for the appellant, that any outside cause, which renders the completion of the contract impossible, is a loss within this section. I think the definition must be confined within narrower limits than that, for in my opinion the word has reference to the existence of the ship as a physical entity, and in my view of the facts of this case it is not necessary to say whether there might in certain circumstances be a loss within the meaning of this section although the ship continued to exist as a ship and was in a condition to complete the voyage. The question must depend on the facts of the particular case.

Taking the narrower view, I have come to the conclusion that by an occurrence which was practically contemporaneous with the capture the vessel was destroyed and ceased to exist, and if we were to hold that, where a ship, without any fault on the part of the owner, has been destroyed, it is not a loss within s. 158, we should be giving no effect at all to that word. I am not prepared, however, to hold that the capture of the ship would, apart from the subsequent destruction, have constituted a loss. Reference has been made to the case of *The Woodhorn* (1), and it was said on the authority of a note on p. 77 of Temperley's Merchant Shipping Act, 1894, that that decision was an authority in favour of the appellant, but I have had an opportunity of reading a short print of the judgment delivered by Butt J., from which it appears that he decided the case on the ground that the ship had been wrecked, not that it had been lost, and the case, therefore, does not assist us in deciding this case.

(1) 92 L. T. Journ. 113.



For these reasons I am of opinion that the respondent was not entitled to be paid any wages after the destruction of the ship on June 2, and that the appeal must, therefore, be allowed.

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RIDLEY J. I agree. In my opinion, the vessel having been captured and then destroyed, there was a loss within the meaning of s. 158. I do not think that the mere capture of a ship by an enemy or a seizure by pirates necessarily constitutes a loss within the section. If in this case nothing had occurred but the taking possession of the ship by the Russians, there would not, in my opinion, have been a loss, for a capture may be followed by recapture, or the vessel may be utilized by the captor. For instance, a French-built ship fought in the British lines at Trafalgar; she had been previously captured from the French, and although in one sense it might have been said that she was lost (that is, so far as the French were concerned), yet I do not think that a vessel could in those circumstances be considered lost within s. 158. The true view seems to me to be that, although a vessel may by reason of capture be a loss to her owner, in order to bring a case within s. 158 there must in addition to capture also be the physical destruction of the ship. In *Austin Friars Steamship Co. v. Strack* (1) the vessel had been confiscated by a prize court at Vladivostok, and it was with reference to that fact that the doubt was expressed in the judgment as to whether the word "loss" in s. 158 would include a case of that sort. It was not necessary, however, to decide that point, for the actual decision of the Court turned on very different considerations; but the doubt which we then expressed as to how far a capture is a loss within s. 158 is, I must confess, very strongly accentuated by the consideration of the facts of the case now before us. I think that in order to bring a case within that section it must be shewn that something has happened to the ship which is equivalent to destruction; and in my opinion the mere taking possession of a ship by an enemy or a pirate does not constitute a loss within s. 158.

DARLING J. I also have come to the conclusion that this appeal must be allowed, but I go rather further than the other members

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of the Court. I think that there was a loss of this vessel when she was captured on May 18. The question is not a mere academic one, because, if I am right, the amount payable to the seaman is smaller than if the loss did not take place till the day when the vessel was destroyed, and therefore I ought to state my reasons for coming to this conclusion. The question which we have to decide is whether there has been a loss of this vessel within s. 158, that is, whether she was a loss so far as the owner was concerned. The *Oldhamia* was a British ship. There is no evidence that she was carrying contraband, or that she was the proper subject of capture by any belligerent. It so happened that while the vessel was on her voyage there were belligerents on the seas, and if she had been the proper subject of capture by either of the belligerents she might have been arrested and taken before a prize court, and then either released or condemned. Nothing of that sort occurred. The *Oldhamia* fell in with some ships which as a matter of fact were commanded by officers of the Russian navy, and Russia was at the time at war with Japan, but that gave them no sort of right to deal with the *Oldhamia* in the way they did. What happened was this. They took the crew of the *Oldhamia* and put them on board a Russian ship; they took the vessel with them for some days and then destroyed her. In these circumstances the question arises what is meant by the word "loss" in s. 158. I think it means a loss by the owner of a ship being permanently deprived of it, and in my view it is immaterial to consider whether, after the owner has been permanently deprived of his ship, she still exists or has ceased to exist. In either case the loss to the owner is exactly the same. In fact, from one point of view, if the vessel was not destroyed after capture, the loss might be greater than if she had been destroyed, because she might be used by her captors to the detriment of her original owners, as indeed did happen in the instance of the French ship mentioned by my brother Ridley; and in this very war the Japanese took Russian ships and used them against the Russians. Can it be said that those ships were not just as much lost to the Russians as if they had been sunk?

It was contended for the respondent that "loss" in s. 158

must be construed to include only matters ejusdem generis with "wreck," and in support of this argument reliance was placed on s. 157, sub-s. 1, which provides that "in all cases of wreck or loss of the ship, proof that the seaman has not exerted himself to the utmost to save the ship, cargo, and stores, shall bar his claim to wages." It was said that if loss includes capture, a seaman who did not resist the capture would lose his right to wages; but I think that argument tells the other way, because it is the duty of every seaman to assist in preventing the loss of the ship from whatever cause it may occur. Were it not so, a seaman would be justified in refusing to set the sails, or to get up steam, in order to take the ship beyond the reach of an enemy intent on her capture.

I am unable to see anything to distinguish the facts of the case from the incidents of piracy. The phrase "perils of the sea" has repeatedly been held to include captures by pirates on the high seas: see *Story on Bailments*, 9th ed. ss. 512, 512 a.

In *Attorney-General for Hong-Kong v. Kwok-A-Sing* (1) Mellish L.J., in delivering the judgment of the Privy Council, quoted, "as a correct exposition of the law as to what constitutes piracy," the charge of Sir Charles Hedges, judge of the High Court of Admiralty, to the grand jury, in *Rex v. Dawson* (2), which was as follows: "Piracy is only a sea term for robbery, piracy being a robbery within the jurisdiction of the Admiralty. . . . If the mariners of any ship shall violently dispossess the master, and afterwards carry away the ship itself or any of the goods with a felonious intention in any place where the Lord Admiral hath jurisdiction, this is robbery and piracy." I do not mean to say that the Russians in taking possession of the *Oldhamia* were guilty of piracy, for they had no felonious intent in so acting, their object probably being to prevent information as to the position of the Russian fleet from coming to the knowledge of the Japanese; but with the exception of the felonious intent all the other incidents essential to piracy were present. The master of the *Oldhamia* was violently dispossessed of his ship, and it is

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(1) (1873) L. R. 5 P. C. 179, at p. 199.

(2) (1696) 13 State Trials, 451, at p. 454.

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I think that the word "loss" in s. 158 is not used in any technical sense, but as meaning loss by perils of the seas. In the present case, the ship having been violently seized, and never having been returned to her owner, there is present every element essential to such a loss. If the vessel had been arrested and in some way held in suspense and subsequently returned to her owner, I should not go so far as to say that that would constitute a loss within this section; but having regard to all the facts, that the seizure was unlawful, was final, and was by force, I am of opinion that there was a loss within s. 158, irrespective of whether the ship was subsequently destroyed or not.

LORD ALVERSTONE C.J. I think I ought to say that, having regard to the rights of belligerents by international law, I do not think that the circumstances of this case can be compared to piracy.

RIDLEY J. Neither do I. The seizure was an act arising out of operations of war.

*Appeal allowed; leave to appeal.*

Solicitors for appellant: *Botterell & Roche.*

Solicitors for respondent: *Chivers & Co.*

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## MILLER &amp; CO. v. SOLOMON; ALLEN, CLAIMANT.

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*County Court—Execution—Claim to Goods—Deposit of Amount of Value—  
"Dispute"—Withdrawal of Bailiff—Order for Sale—Retaking Possession  
—County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 156—County Court  
Rules, 1903, Order XXVII, r. 13.*

Goods which had been taken in execution under a county court judgment were claimed by a bill of sale holder. Notice of the claim was given by the bailiff to the execution creditor. The claim not having been admitted, the claimant deposited with the bailiff, under s. 156 of the County Courts Act, 1888, the amount of the judgment debt and costs, as being the value of the goods. The money was paid into Court by the bailiff, who then withdrew from possession and applied for an interpleader summons. On the same day that the summons was issued the execution creditor gave notice of his intention to apply for an order for the sale of the goods under Order XXVII, r. 13, of the County Court Rules, 1903. On the hearing of the application the execution creditor (who had been given no opportunity of being heard as to the value of the goods before the bailiff withdrew) admitted the claimant's title, but alleged, and was prepared with evidence to prove, that the value of the goods was sufficient to satisfy the amount due on the bill of sale and the judgment debt and costs. The county court judge, without hearing the evidence, held that, the bailiff having withdrawn from possession, he had no power to order a sale:—

*Held*, that if the amount deposited with the bailiff was not the value of the goods his withdrawal from possession was wrongful, and the county court judge had power in that case to order him to retake possession; and that the case must go back to the county court judge for him to determine after hearing the evidence whether the circumstances were such that an order for sale ought to be made.

The "dispute" as to the value of goods taken in execution referred to in s. 156 of the County Courts Act, 1888, means a dispute between the claimant and the execution creditor.

## APPEAL from the Whitechapel County Court.

In an action in the county court the plaintiffs recovered judgment against the defendant for 19*l.* and costs, and on September 10, 1905, execution was issued thereon against the defendant's goods. One Allen claimed the goods under a bill of sale, and on September 21 notice of the claim was duly given by the bailiff to the plaintiffs. They did not give notice to the bailiff that they admitted the title of the claimant to the goods. On September 22, the claimant deposited with the bailiff the



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amount of the debt and costs, which the bailiff paid into Court, and the bailiff went out of possession. The bailiff afterwards informed the plaintiffs that he had gone out of possession, and the plaintiffs then learnt for the first time that the amount deposited by the claimant with the bailiff, which, under s. 156 of the County Courts Act, 1888 (1), should be the amount of the value of the goods claimed, was the amount of the judgment debt and costs.

On September 25, on the application of the bailiff, an interpleader summons was issued returnable on October 25. On the same day the plaintiffs gave notice to the claimant of their intention to apply to the county court judge under Order xxvii., r. 13, of the County Court Rules (2) for an order for the sale of the goods seized. On the hearing of the application on October 10 it was admitted by the plaintiffs that they could not dispute the claimant's title under the bill of sale, but it was alleged that if the goods were sold there would be a surplus, after discharging the amount due for principal and interest under the bill of sale,

(1) County Courts Act, 1888 (51 & 52 Vict. c. 43), s. 156: "Where any claim shall be made to or in respect of any goods taken in execution under the process of the Court, the claimant may deposit with the bailiff either the amount of the value of the goods claimed, such value to be affixed by appraisement in case of dispute, to be by such bailiff paid into Court to abide the decision of the judge upon such claim, or the sum which the bailiff shall be allowed to charge as costs for keeping possession of such goods until such decision can be obtained, or may give to the bailiff in the prescribed manner security for the value of the goods claimed, and in default of the claimant so doing the bailiff shall sell such goods as if no such claim had been made, and shall pay into Court the proceeds of such sale to abide the decision of the judge."

(2) Order xxvii., r. 13, of the

County Court Rules, 1903, provides that "When goods or chattels have been seized in execution under process of the Court, and any claimant alleges that he is entitled under a bill of sale or otherwise to such goods or chattels by way of security for a debt, the judge may order a sale of the whole or part thereof, and may direct the application of the proceeds of such sale in such manner and upon such terms as may be just. A duplicate of such order shall be delivered by the registrar to the high bailiff, who shall thereupon forthwith sell the goods or chattels pursuant to the order, and after deducting the expenses of the sale and the taxes and rent, if any, directed by the order to be paid, shall pay the balance of the proceeds into Court, and such balance shall thereupon be applied by the registrar in accordance with the directions contained in the order of the Court."

sufficient to satisfy wholly or in part the judgment debt and costs. The plaintiffs were prepared with evidence to support this allegation, but their witness was not called because the point was taken on behalf of the claimant that, the bailiff having gone out of possession, the county court judge had no power to order a sale. The judge upheld this contention and refused to order a sale. From that refusal the plaintiffs appealed.

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*Tindale Davis*, for the plaintiffs. The county court judge was wrong in holding that, by reason of the fact that at the time of the application the bailiff was not in possession of the goods, he had no power to order a sale. Order xxvii., r. 13, does not specify any particular time at which the order for a sale must be made, and it is submitted that the order can be made at any time before the execution is completed, and the execution is not completed until either the execution creditor has given notice in the prescribed form admitting the title of the claimant to the goods seized or an interpleader summons has been issued: *Ex parte Ford*. (1) At the time the plaintiffs gave their notice of the application for an order of sale they had not admitted the claim, nor had the interpleader summons issued, for it was only applied for on the same day as the notice was given. The fact that the bailiff was not in possession at the date of the hearing of the application was, therefore, immaterial. Further, the bailiff in going out of possession acted wrongfully. The requirements of s. 156 of the County Courts Act, 1888, had not been complied with. The bailiff released the goods on receiving from the claimant the amount of the judgment debt and costs, but he should have been paid the value of the goods, and according to the evidence which the plaintiffs were prepared to give before the county court judge the real value of the goods seized was sufficient to satisfy both the amount of the claimant's security and the amount of the judgment debt and costs. Sect. 156 provides that if there is a dispute as to the value of the goods, that is, a dispute between the execution creditor and the claimant, the value shall be affixed by appraisement. The

(1) (1886) 18 Q. B. D. 369.

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plaintiffs had no notice that the value of the goods had been agreed between the bailiff and the claimant to be the amount of the judgment debt and costs, and consequently the plaintiffs had no opportunity of disputing that value and of having the goods appraised. The withdrawal of the bailiff being wrongful, the judge could and ought to have directed him to re-enter if, which is not admitted, it is a condition precedent to an order for sale under Order xxvii., r. 13, that the bailiff should at the time of the order still be in possession of the goods.

[He referred to *Paquin v. Robinson* (1) and *Stern v. Tegner*. (2)]

*Louis Green*, for the claimant. The practice with regard to the sale of goods taken in execution and claimed by the holder of a bill of sale or other security is not the same in the county court as in the High Court. In the High Court the sheriff remains in possession until the interpleader order is made; Order lvii., r. 12, gives the Court power to order a sale, and the order is usually made at the same time as the interpleader order. In the county court under s. 156 of the County Courts Act the bailiff goes out of possession as soon as the claimant deposits with him, or gives security for, the amount of the value of the goods. As soon as this is done the bailiff has to withdraw from possession, and the execution is at an end. For the purpose of deciding the question between the execution creditor and the claimant the money in Court, or the security given by the claimant, takes the place of the goods: *Smith v. Critchfield* (3); *Kotchie v. Golden Sovereigns*. (4) The plaintiffs' application for an order for sale was, therefore, too late, for at the time of the notice of the application the bailiff had gone out of possession. The bailiff is not bound to remain in possession in order to give the execution creditor an opportunity of applying for an order for sale: *Scarlett v. Hanson*. (5) If the withdrawal of the bailiff from possession of the goods was wrongful, it is none the less an answer to the plaintiffs' application. Their only remedy is by an action against the bailiff. But the withdrawal was not wrongful. All the requirements of s. 156 were complied with. There is nothing in that section entitling

(1) (1901) 85 L. T. 5.

(3) (1885) 14 Q. B. D. 873.

(2) [1898] 1 Q. B. 37.

(4) [1898] 2 Q. B. 164.

(5) (1883) 12 Q. B. D. 213.

the execution creditor to be heard on the question of the value of the goods seized, and the question whether the sum deposited was the value cannot now be reopened. The dispute referred to in the section means a dispute between the bailiff and the claimant. The bailiff has no power to seize the goods a second time in the same execution: *Haddow v. Morton*. (1)

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*Tindale Davis* replied.

KENNEDY J. This case is not free from difficulty, but on the whole I think the county court judge was wrong. The facts as I understand them seem to be that a judgment having been recovered against the defendant in the county court, the bailiff of the county court was directed to levy on the goods of the defendant for the amount of the judgment debt and costs, and he proceeded accordingly to seize certain goods. Notice was then given to the bailiff by the claimant that he claimed all the goods seized on the ground that they were included in a bill of sale held by him. Thereupon the bailiff, without communicating with the Court or the execution creditor, arranged with the claimant that he would go out of possession if the claimant paid a certain sum of money into Court, which represented the amount of the judgment debt and costs. It is alleged that the real value of the goods exceeded that sum. The money was paid into Court, and the bailiff then withdrew from possession. The execution creditor was not in a position to contest the claim of the bill of sale holder, but before there had been any definite refusal by him to take an issue he applied to the county court judge under Order xxxvii., r. 12 (which is analogous to Order lvii., r. 12, of the Rules of the Supreme Court), for an order for the sale of the goods. Under that rule a county court judge has power to order the sale of goods which have been taken in execution and which are the subject of dispute between the execution creditor and the claimant, not merely with a view of converting the goods into money, but in order to direct the application of the proceeds in such manner and in such terms as may be just. One object of this procedure is in my opinion to enable justice to be done between the parties in cases where

(1) [1894] 1 Q. B. 565.



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the legal title of the bill of sale holder being admitted, it is alleged that, after the discharge of his security by payment out of the proceeds of the goods, there will still be a surplus remaining which can be applied to satisfying in whole or in part the execution creditor's debt. Notwithstanding that procedure it was held in *Scarlett v. Hanson* (1) that no action will lie against the bailiff for withdrawing and returning nulla bona, one reason being that the bailiff is not entitled to seize equities. But that leaves untouched the question whether in the circumstances of this case the judge was wrong in refusing to consider whether if a sale was ordered there might not be a surplus over and above the amount of the bill of sale which could be equitably taken by the execution creditor to satisfy his debt. It is quite true that when goods are taken in execution and a claim is made the rules provide that the value of the goods seized may be paid into Court. But it is the value of the goods, not the amount of the judgment debt and costs, which is to be paid in, and in the case of dispute the rule provides that the value is to be ascertained by appraisement. If that is done there is no further right to deal with the goods, because they are represented by the money in Court, and any surplus after satisfying the claim of the bill of sale holder may be ordered to be paid out to the execution creditor. In the present case it is alleged that the value of the goods was not paid into Court, but it is contended for the claimant that the county court judge was right in refusing to make the order for a sale because the order has to be directed to the bailiff, and at the time of the application the bailiff was no longer in possession of the goods; and it is said that the only remedy open to the plaintiffs is by action against the bailiff for wrongfully withdrawing from possession. In my opinion the fact that the bailiff had withdrawn from possession is not a reason why the judge should refuse to order a sale, if he is satisfied that otherwise it would be desirable. A bailiff has power to re-enter if he is directed by the execution creditor to do so: see *Mather on Sheriff Law*, p. 82; and, if so, a fortiori the judge could order him to re-enter if in his discretion he thought it necessary and desirable for the purpose of ordering a sale.

(1) 12 Q. B. D. 213.



Then it is said that there was no power to order a sale in this case because the sum which it had been agreed should represent the value of the goods had been paid into Court. It is quite clear that the money was paid in as representing, not the value of the goods, but the amount of the judgment debt and costs; and when it is argued that there was no dispute as to the value of the goods and that the amount paid in was an agreed sum, I must point out that the dispute referred to in s. 156 is a dispute between the parties interested, the claimant and the execution creditor, and the arrangement as to the payment into Court of the amount of the judgment debt and costs was made by the claimant with the bailiff without the agreement or even the knowledge of the plaintiffs, the execution creditors.

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When the application for a sale was before the county court judge the plaintiffs were prepared with evidence to shew what was the real value of the goods, but the evidence was not heard because the claimant took the point that in any case there was no power to order a sale after the bailiff had withdrawn from possession. None of the cases cited appears to me to justify that view, and I am of opinion that in the circumstances of this case the county court judge had jurisdiction to make an order for the sale of the goods; and the case must go back for him to hear the evidence and decide whether the case is one on which it is proper that the order should be made.

A. T. LAWRENCE J. I am of the same opinion. It appears to me that the bailiff did not follow the course prescribed by the County Court Rules. He went out of possession of the goods, not receiving from the claimant payment of or security for the value of the goods, but merely the amount of the judgment debt and costs. That left the execution creditor in this position: He must either shew that the bill of sale was void or fail altogether in the execution, in spite of the fact that it is alleged in the execution creditor's affidavit that the value of the goods is greater than the sum secured by the bill of sale. It is clear that this question as to the value of the goods must be investigated by the county court judge, and if after hearing the evidence he comes to the conclusion that there is ground for thinking that

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the value of the goods is in excess of the sum claimed under the bill of sale, then he must direct the bailiff to re-enter and sell the goods. It cannot be right that a bill of sale holder, whose security is for a small sum on goods of large value, should be allowed to put an execution creditor in this dilemma and permit goods to escape execution by means which might be employed for the furtherance of a dishonest purpose.

With regard to the point under s. 156, I do not agree with the contention that the dispute mentioned in that section refers to a dispute between the bailiff and the claimant. The duty of the bailiff is to give notice of the claim to the execution creditor in order that he may decide whether or not he will take an issue. In order that the execution creditor may be in a position to determine whether he will take an issue, it is most important for him that the real amount of the value of the goods shall be paid into Court, for if the amount is sufficient to satisfy both the claimant's security and the judgment debt and costs, it becomes unnecessary for the execution creditor to dispute the title of the claimant.

*Appeal allowed; leave to appeal.*

Solicitors for execution creditors : *Raphael & Co.*

Solicitors for claimant : *George Vandamm & Co.*

F. O. R.

[CROWN CASE RESERVED.]

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*April 28.*THE KING *v.* LINNEKER.

*Criminal Law—Attempt to discharge loaded Arms—Evidence for the Jury—  
Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 18.*

The prisoner was indicted under s. 18 of the Offences against the Person Act, 1861, with attempting to discharge a loaded revolver at the prosecutor with intent to do him grievous bodily harm. Evidence was given at the trial that during an interview between the prisoner and the prosecutor the prisoner drew a loaded revolver from his coat pocket. The prosecutor immediately seized the prisoner and prevented him from raising his arm; a struggle ensued, in the course of which the prisoner nearly succeeded in getting his arm free, but after a few minutes the prosecutor wrested the revolver from him and he was taken into custody. During the struggle the prisoner several times said to the prosecutor, "You've got to die":—

*Held*, that there was evidence upon which the prisoner could properly be convicted of an attempt to discharge the revolver within the meaning of s. 18.

CASE stated by Jelf J. for the opinion of the Court for Crown Cases Reserved.

The prisoner was tried at the Derby Winter Assizes on March 3, 1906, on an indictment charging him under 24 & 25 Vict. c. 100, ss. 14 and 18, in the first count with feloniously attempting to discharge a certain revolver loaded with gunpowder and leaden bullets at one John Plowright Houston with intent to murder him; in the second count the same with intent to commit murder; and in the third count the same with intent to do the said John Plowright Houston some grievous bodily harm.

The indictment did not contain the words "by drawing a trigger," nor did it specify any other manner in which the attempt was made; but no objection was taken to the indictment on this or any other ground, the only objection being as herein-after mentioned, that the evidence did not bring the case within the statute. (1)

(1) The Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), s. 18: "Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger or in any other manner,

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The prisoner was convicted under the third count (sentence being postponed to the next assizes, and the prisoner being admitted to bail meanwhile) subject to the following case:—

Mr. Houston was the general manager of the Bolsover Colliery. The prisoner, a young man in the employment of the colliery owners, interviewed Mr. Houston at his office on February 16 on the subject of his chance of promotion in the service.

There was no sort of quarrel between them. Presently, in answer to a question, Mr. Houston said: "Why do you ask me that question?" The prisoner said, "I am going to tell you why"; and he at once put his right hand into his overcoat pocket and commenced to pull something out. Mr. Houston saw something glitter like silver (which turned out to be a six-barrelled revolver), and it at once struck him that there was going to be some mischief. Before prisoner got the revolver (five barrels of which were loaded) quite clear of his pocket Mr. Houston jumped up from his chair and sprang on to the prisoner, and was able to lay hold of his arm before he could raise it up. Prisoner had got the revolver clear from his pocket and had half risen from his chair when Mr. Houston seized him. They struggled for a few minutes. Once, when Mr. Houston tried to open the door, prisoner nearly got his arm loose, his right hand holding the revolver. While they were struggling prisoner said several times, "You've got to die." Eventually Mr. Houston wrested the revolver from him, and with the assistance of another witness took him to the police station. On the way prisoner said, "I shall very likely have to do time for this, but whether it is long or short I shall do for you when I come out." Mr. Houston said, "Why, what have I done to you?" and prisoner said, "I think you have kept me back."

Upon these facts it was submitted by counsel for the defence that there was no evidence of an attempt under the statute either with intent to murder or with intent to do grievous bodily harm.

attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any

person, or to do some other grievous bodily harm to any person . . . shall be guilty of felony. . . ."



The learned judge overruled the objection, and told the jury that if they thought the prisoner took the revolver out of his pocket for the purpose of shooting Mr. Houston, and that, if he had not been interrupted, he would have, or probably would have, accomplished that purpose, they might find him guilty of the attempt to discharge the revolver at Mr. Houston either with intent to murder or with intent to do grievous bodily harm. The jury convicted him on the third count. No objection was taken to the language of the summing up, the only point being that there was no case within the statute.

If in the opinion of the Court there was evidence of an attempt within s. 14 and s. 18 the conviction was to stand; if not, it was to be quashed.

*A. M. White*, for the prosecution. The question is whether there was any evidence of the attempt to discharge the pistol with intent to do grievous bodily harm to the prosecutor. In *Stephen's Digest of the Criminal Law* (1st ed.), art. 49, it is stated that "an attempt to commit a crime is an act done with intent to commit that crime, and forming part of a series of acts which would constitute its actual commission if it were not interrupted." It is submitted that there was evidence of an "attempt" to bring the case within that definition. The attempt was begun directly the prisoner commenced to pull the revolver out of his pocket, his intent clearly being to fire it at the prosecutor. That act was one of a series of acts which if it had not been interrupted would have constituted the actual commission of the crime. In *Reg. v. Brown* (1), where the facts were very similar to the present, the question was whether there had been an offence under s. 15, and the Court, while holding that there had not, intimated that the facts shewed an offence within s. 14, which for this purpose is the same as s. 18. In *Reg. v. St. George* (2) it was held that the words "by drawing a trigger or in any other manner" in 7 Will. 4 & 1 Vict. c. 85, ss. 3 and 4, which are reproduced in ss. 14 and 18 of the Act of 1861, only covered attempts ejusdem generis with drawing a trigger, but that case,

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(1) (1853) 10 Q. B. D. 381.

(2) (1840) 9 C. & P. 483.



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REX	<i>Reg. v. Duckworth</i> . (2)
v.	No one appeared for the prisoner.
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LORD ALVERSTONE C.J. In my opinion this conviction must be affirmed. The gist of the offence under s. 18 of the Offences against the Person Act, 1861, is the attempt to discharge a weapon with the intent to do grievous bodily harm. It is not sufficient to constitute an offence under that section that there should be merely an intention or a preparation to discharge the weapon; there must be an attempt to do so. The question which we have to determine is whether there was in this case any evidence of such an attempt, for if there was any evidence the conviction must be affirmed. The evidence was that the prisoner had a loaded revolver in his pocket; he put his hand in his pocket and commenced to pull it out; the prosecutor seized him, and a struggle then took place between them; the prisoner got the revolver out of his pocket and endeavoured to get his arm free, at the same time using language which clearly indicated that his intention was to use the revolver if he could. I am of opinion that it would be wrong to hold that those facts were not evidence of an attempt to discharge the revolver within the meaning of s. 18. The case seems to me to come exactly within the definition of an "attempt" given in Stephen's Digest of the Criminal Law. The authorities also support this view. It was held in *Reg. v. St. George* (3), decided under an earlier statute, the language of which was the same as that of s. 14 and s. 18 of the Act of 1861, that the attempt must be an act ejusdem generis with drawing the trigger of the pistol; but that case was expressly overruled in *Reg. v. Duckworth* (2), where the facts were that the prisoner raised his arm and pointed a pistol at another person, having his hand upon the trigger. In *Reg. v. Brown* (1) the judge who tried the case had left it to the jury under s. 15, because he thought that on the authority of *Reg. v. St. George* (3) there was no evidence of an offence under s. 14; but all the judges in this Court, while holding that the case did not fall

(1) 10 Q. B. D. 381.

(2) [1892] 2 Q. B. 83.

(3) 9 C. &amp; P. 483.

within s. 15, expressed the opinion that but for the decision in *Reg. v. St. George* (1), the correctness of which they doubted, there would have been clear evidence of an offence under s. 14. The language of the material part of s. 14 is the same as that of s. 18, and therefore in holding that in the present case there was evidence of an attempt within s. 18 we are not only deciding in accordance with that which is, in my opinion, the true view of the section, but we are also supported in our decision by the opinions expressed in *Reg. v. Brown* (2) and in *Reg. v. Duckworth*. (3)

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KENNEDY J. I am of the same opinion, and only desire to add a few words. I think that there was sufficient evidence to leave to the jury on the question whether there was an attempt on the part of the prisoner to discharge the revolver. It is, however, important to bear in mind that in cases under this section there must be evidence both of an attempt to discharge the weapon and of an intent to do grievous bodily harm, and, although an attempt implies the intent, an intent does not necessarily imply an attempt. There may be cases which are very near the line as regards the attempt, although there is no doubt as to the intent. It is always necessary that the attempt should be evidenced by some overt act forming part of a series of acts which, if not interrupted, would end in the commission of the actual offence.

RIDLEY J. I agree. The language of ss. 14 and 18 of the Act of 1861, which are repeated with some additions from the Act of 1837, clearly involve both intent and an attempt. On the facts of this case I am clearly of opinion that there was evidence of an attempt proper to be left to the jury.

DARLING J. I am of the same opinion. The statute deals in both s. 14 and s. 18 with two matters which have to be present in every case to constitute the crime. First, there must be evidence of the physical act, the attempt to discharge the firearm. That can be proved by evidence of what the man was

(1) 9 C. & P. 483.

(2) 10 Q. B. D. 381.

(3) [1892] 2 Q. B. 83.

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doing with his hands, holding a pistol and so on : and if he did these acts which, if not prevented, he would do in order to discharge a pistol, then there is evidence of an attempt. In the case before us the prisoner pulled a loaded revolver out of his pocket and struggled with the prosecutor, attempting to free his arm, which the prosecutor had caught hold of. I think that those facts are evidence of an attempt to discharge the revolver. But the offence under ss. 14 and 18 is not complete unless there was an intent in the one case to murder, and in the other to do grievous bodily harm. In some of the cases there has been a difficulty as to what constitutes evidence of intent, but there is none here, because the prisoner told the prosecutor that he had got to die.

WALTON J. The question is, Was there any evidence of an attempt by the prisoner to discharge the revolver? It is clear that all acts done for the purpose of committing a crime are not attempts, for they may be merely acts of preparation; but, applying the definition of an attempt given in Stephen's Digest of the Criminal Law, art. 49, I am clearly of opinion that there was in this case evidence of an attempt.

*Conviction affirmed.*

Solicitor for prosecution : *M. H. Humble, Chesterfield.*

F. O. R.

FOSS, APPELLANT *v.* BEST, RESPONDENT.

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May 10, 11.

*Justices—Felony—Refusal to Commit—Case stated—Non-service of Notice of Appeal and Case on Respondent—Jurisdiction to state Case—Summary Jurisdiction Act, 1867 (29 & 31 Vict. c. 43), s. 2, and 1879 (42 & 43 Vict. c. 49), s. 33.*

The Court has no jurisdiction to hear an appeal against a decision of justices by way of case stated unless the appellant has given the respondent notice in writing of the appeal together with a copy of the case as required by s. 2 of the Summary Jurisdiction Act, 1867, and this is so although the appellant has been unable to serve the respondent, having failed to find him notwithstanding every effort to do so.

*Syred v. Carruthers*, (1858) E. B. & E. 469, distinguished.

*Scintilla*. Justices have no power to state a case under s. 33 of the Summary Jurisdiction Act, 1867, where they have dismissed an information for felony and declined to commit the person charged for trial.

## CASE stated by justices of Surrey.

The respondent was charged upon an information for having on December 5, 1905, being then a servant in the employment of the Mitcham Common Conservators, received for and on account of his masters the sum of 7*l.* and feloniously embezzled the same.

At the hearing of the information (at which the respondent was not represented by solicitor or counsel) the following facts were admitted or proved:—

The respondent was appointed by the conservators to be keeper of the common at a weekly salary, his duties being to protect the common; he was not authorized to cut or sell trees, or to receive money for the conservators. On December 4, 1905, the respondent sold four willow trees, and on the following day received for the same the sum of 7*l.*, giving a receipt for the amount, and adding after his signature the words "for Mitcham Common conservators." He failed to account to the conservators for the money.

The justices dismissed the information, and refused to commit the respondent for trial, being of opinion that as he was not authorized in any way to cut or sell willow wood, or to receive

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money for or in the name or on account of the conservators, and did not in fact or in law do so, the offence of embezzlement had not been committed ; but they stated the present case.

The question for the opinion of the Court was whether the justices had come to a correct determination in point of law.

During the hearing of the appeal it appeared that no notice in writing of the appeal with copy of the case had been served on the respondent as required by s. 2 of the Summary Jurisdiction Act, 1857, but it was stated in an affidavit that it had been impossible to comply with this statutory requirement because the respondent could not be found, although every effort had been made to trace him.

*W. de B. Herbert* (*Lewis Thomas* with him), for the appellant. There is jurisdiction to hear the appeal, notwithstanding that statutory service of the notice of appeal and case has not been effected upon the respondent, provided that the Court is satisfied that every effort to effect service has been rendered nugatory by the disappearance of the respondent. Strict compliance with the requirements of s. 2 of the Summary Jurisdiction Act, 1857, was waived by the Court in *Syred v. Carruthers* (1), where service was allowed to be made on the solicitor of a respondent who could not be found within the time limited. In the present case that course was not practicable, as the respondent had no solicitor. In *Edwards v. Roberts* (2) and *Hill v. Wright* (3) service on the respondent's solicitor was held not to be a sufficient compliance with the statute, but in each of these cases the respondent could have been found, and no attempt seems to have been made to effect service on him personally.

[CHANNELL J. In *Syred v. Carruthers* (1) notice was given to the respondent after the three days without objection on his part. Is there any authority for saying that justices can in a purely criminal charge state a case where they decline to commit the accused ?]

In *Ferens v. O'Brien* (4) a case was stated where the justices declined to convict on a charge of larceny.

(1) E. B. &amp; E. 469.

(3) (1896) 60 J. P. 312.

(2) [1891] 1 Q. B. 302.

(4) (1883) 11 Q. B. D. 21.



[CHANNELL J. In that case the point was not taken, and the accused when before the justices elected to be dealt with summarily.]

It is nevertheless an authority for the proposition that a case can be stated by justices where there has been an acquittal.

[*Macmorran, K.C.*, as amicus curiæ, referred to *Reg. v. London (County) Justices*. (1)]

That was a decision under the Highway Act, 1835, and dealt with appeals to quarter sessions, which give rise to very different considerations. Apart from authority, it is clear from s. 33 of the Summary Jurisdiction Act, 1879 (2), that justices have jurisdiction to state a case in such circumstances as the present. The language of that section is much wider than that of s. 2 of the Act of 1857, and applies not merely to the hearing and determination of "any information or complaint which he or they have power to determine in a summary way," but to the questioning of an "order, determination, or other proceeding of a Court of summary jurisdiction."

The respondent was not represented.

DARLING J. In this case the justices before whom the respondent appeared on a charge of embezzlement came to the conclusion, as a matter of law, that there was no ground for committing him for trial, and accordingly they refused to do so. There was no question of the case being dealt with summarily.

The respondent is not represented before us, for the sufficient reason that he has not been served with the notice to which the Summary Jurisdiction Act, 1857, entitles an accused person who has got a decision of the justices in his favour, when it is desired to question that decision by a special case for the opinion of this Court. The reason that the respondent has not been served is stated to be that he cannot be found. The statute, however, says

(1) (1890) 25 Q. B. D. 357.

(2) Sect. 33, sub-s. 1, of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49): "Any person aggrieved, who desires to question a conviction, order, determination, or other proceeding of a Court of sum-

mary jurisdiction, on the ground that it is erroneous in point of law, or is in excess of jurisdiction, may apply to the Court to state a special case setting forth the facts of the case and the grounds on which the proceeding is questioned . . . ."

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that he is to be served, and if we were able to see something which we might reasonably hold to be equivalent to service we might possibly overrule that objection to our hearing this appeal; but there is nothing that can be suggested to amount to service. I think, therefore, that we have no jurisdiction to hear this appeal. The point has been taken by my brother Channell whether the justices had power to state a case. It is contended for the appellant that although the justices had given a decision in favour of a person charged with felony they could state a case upon the application of the prosecutor as being a person aggrieved. The only decision cited to us which can be suggested to be an authority for this proposition is *Ferens v. O'Brien* (1), where the defendant having pleaded not guilty and desired to be dealt with summarily, the justices declined to convict, but stated a case for the opinion of this Court, the question being whether or not water could be the subject of larceny at common law. That case is clearly distinguishable, for there the defendant pleaded not guilty and desired to be dealt with summarily. I do not say that *Ferens v. O'Brien* (1) was wrongly decided, but the point as to the power of the justices to state a case was not taken. It is possible that the justices had power to state a case as a consequence of the desire of the defendant to be dealt with summarily; but I express no opinion as to whether that was the ground of the decision or whether such a ground was a good one.

Another case has been brought to our notice by Mr. Macmorran as *amicus curiæ*—the case of *Reg. v. London (County) Justices*. (2) The statute under consideration in that case was not the same as that with which we are dealing here, but for the present purpose its language, to my mind, is indistinguishable. *Ferens v. O'Brien* (1) does not seem to have been cited in that case; but the reasoning of the judgments in *Reg. v. London (County) Justices* (2) covers the present case, and disposes of the appellant's contention. In the course of his judgment Lord Coleridge C.J. said: "We must decide this case on principle, for no case has been brought before us by the learned counsel on either side in which the point has been directly or even

(1) 11 Q. B. D. 21.

(2) 25 Q. B. D. 357.

indirectly decided. The question arises on the Act of 1835, and a claim to have an appeal after acquittal is now for the first time made, although there must have been thousands of instances of acquittals which have dissatisfied the prosecutors." That observation applies even more forcibly here, for if there have been thousands of cases upon the Highway Act, 1835, there must have been very many more at common law. The Lord Chief Justice then proceeded: "The reason why no case has ever arisen before must, in my judgment, be that, on scanning s. 105, prosecutors who might otherwise have desired to appeal against an acquittal have felt that the language of the section was against them. I do not deny that this is 'determination made' by the justice, and may be 'a matter or thing done by the justice in pursuance of the Act'; and, therefore, if it were enough to find a word or two in a section of this kind which would carry an appeal, the argument for the appellant would be entitled to succeed, for there are words capable of the meaning contended for." In the present case the appellant's counsel cannot put his contention higher than that there are words in the section we are considering capable of the meaning contended for by him. Lord Coleridge continued: "But that is not quite the way in which the section should be regarded when we are asked to hold that there is an appeal after acquittal, which is, *prima facie*, not given by law. A person is prosecuted for some breach of the law which is to be proved in a particular way. The general principle of law is that, if acquitted, he is not to be a second time vexed." Later in the same judgment he said: "Our decision must be governed by broad and well-recognized principles of construction. One of those is that a man acquitted is not to be again proceeded against with respect to the same matter; another principle is that an appeal is never given except by statute. That brings us to the consideration of s. 105. My opinion, on full consideration, is that this section does not give an appeal except in cases of conviction." That learned and painstaking judge, Wills J., in giving judgment to the like effect, said: "No instance can be found in the books of an appeal successfully prosecuted, or even attempted to be brought, after an acquittal. I have looked with some care into

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the books where such an instance would, if it existed, be likely to be found, and I have not discovered any, and so far as appears in every work I have consulted which throws light on the subject the appellant is always treated as a person who has been convicted or suffered something analogous to conviction." In this case we have had no case cited to us which goes the length contended for on behalf of the appellant.

In my opinion we cannot entertain this appeal because of the want of service to which I have referred, and upon the other point the inclination of my opinion is that no such appeal can lie.

CHANNELL J. I am of the same opinion. The one decision that we are giving is that we have no jurisdiction to hear this appeal as the conditions of the statute have not been complied with, there having been no service on the respondent or upon anyone else, and nothing equivalent to service. This point is constantly arising, and whenever it arises the case of *Syred v. Carruthers* (1) is cited; but all that was there decided was that the Court found facts which they were able to hold were a sufficient compliance with the conditions as to service. In the present case we are asked to cut out of the statute the provision that the respondent is to be served, and to hold that where the respondent cannot be found the appeal can be heard without service.

Assuming, however, that we had a discretion in the matter, this is not a case in which we ought to exercise our discretion to hear the appeal, because there is the gravest possible doubt as to whether a case can be stated upon an acquittal. To begin with, a case can only be stated in respect of a "conviction, order, determination, or other proceeding of a Court of summary jurisdiction," and I think that justices who are taking depositions for the purpose of committing a prisoner for trial have not this power to state a case, as they are not exercising summary jurisdiction. Here the justices were not proceeding to deal with the case summarily. Even if it had appeared that they were sitting as a Court of summary jurisdiction, either by

(1) E. B. & E. 469.

reason of the respondent electing to be dealt with summarily or otherwise, the difficulty remains whether the prosecutor would be a person aggrieved who could require a case to be stated. There is much in the judgment of Lord Coleridge C.J. in *Reg. v. London (County) Justices* (1) to shew that in ordinary cases a prosecutor is not a person aggrieved, and in my opinion it is extremely doubtful whether in a case of a purely criminal character—as distinct from one of a quasi-criminal nature, as, for example, in a prosecution for a breach of by-laws—a case can be stated under this procedure where the defendant has been acquitted.

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In view of our judgment upon the first point, I am not giving any final decision as to the power of justices to state a case under such circumstances, but, as I have said, I have the greatest possible doubt as to whether there is any such jurisdiction. I may point out that we are not depriving the prosecutor of any remedy, for he may, if he thinks fit, prefer an indictment against the respondent.

*Appeal dismissed.*

Solicitors for appellant: *Edridge & Newnham.*

(1) 25 Q. B. D. 357.

W. J. B.



C. A.

[IN THE COURT OF APPEAL.]

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May 17.

GUARDIANS OF SOUTHWARK UNION, APPELLANTS *v.*  
GUARDIANS OF CITY OF LONDON UNION,  
RESPONDENTS.

*Poor Law—Irremovability—Married Woman deserted by her Husband—Desertion, What constitutes—Poor Removal Act, 1861 (24 & 25 Vict. c. 55), s. 3.*

Where a married woman is, whether rightfully or wrongfully, sent away by her husband to lead a separate and independent life of her own, she is deserted by him within the meaning of the Poor Removal Act, 1861, s. 3, and can so reside as to acquire the status of irremovability apart from him under that section.

A married woman, having contracted habits of intemperance, frequently pawned her husband's goods in order to procure drink, and on several occasions used for other purposes money given to her by him for payment of his rent, and had conducted herself in such a manner as to render it impossible for her husband to keep a respectable home for his children. He in consequence informed her that they must live apart for a time; that she might take sufficient furniture to furnish a bedroom, and he would allow her 8s. a week; and that she must endeavour to get rid of her drinking habits, and, if she did so, they could live together again. She accordingly left him and took a lodging for herself, and for eleven months he continued to make her the promised allowance, but then, finding that she had been guilty of adultery, he discontinued it, and she thereupon went to cohabit with another man, and her husband never again lived with her:—

*Held*, that the husband had deserted his wife within the meaning of the Poor Removal Act, 1861, s. 3.

*Reg. v. Maidstone Union*, (1879) 5 Q. B. D. 31, followed.

APPEAL from the judgment of a Divisional Court upon a case stated from the Quarter Sessions for the City of London on an appeal against an order of justices adjudging that a pauper lunatic had acquired a status of irremovability from the appellants' (the Southwark) union.

The facts as stated in the case were as follows:—The lunatic, Ellen Roff, was the lawful wife of Frederick Roff, to whom she was married on August 25, 1886. From the date of the marriage until October 12, 1895, Frederick Roff and Ellen Roff resided and cohabited at No. 73, Fitzallan Street, Lambeth Walk, in the

parish of Lambeth, which is not within the appellants' union. Previously to October 12, 1895, Ellen Roff had given way to habits of intemperance, and had been habitually drunk. She had frequently pawned her husband's goods in order to get drink, and had neglected the children of the marriage, of whom there were four. She had on several occasions spent, for purposes other than that for which it had been intended, money given to her by her husband in order to pay the rent of the house, and had conducted herself in a manner which rendered it impossible for her husband to keep a respectable home for his children. On October 12, 1895, Frederick Roff, upon his return home from work, found that a distress was being levied on his goods at No. 73, Fitzallan Street for the non-payment of rent, and that his wife had spent in obtaining drink the money given her for the purpose of paying his rent. He thereupon told her that he would not put up with this state of things any longer, and he and she must part for a time, and that she would have to find some other lodging, and he would allow her the sum of 8s. a week as long as she kept straight; that she must do her utmost to get rid of her drinking habits, and, if she reformed, he and she could live together again; and that she could take enough furniture to furnish a room. The distress was withdrawn by arrangement between Frederick Roff and his landlord, and Ellen Roff remained at No. 73, Fitzallan Street until she found another lodging, during which period her husband occupied a separate bedroom. On October 22, 1895, she left No. 73, Fitzallan Street, taking with her sufficient furniture to furnish a bedroom. Frederick Roff likewise left Fitzallan Street on the same day, taking with him his four children and the remainder of the furniture. He had since October 22, 1895, resided separately from Ellen Roff, and had never again cohabited with her. A few weeks after October 22, 1895, Frederick Roff met his wife by accident at the house of her aunt, and at her request he said that he would take her back if she would mend her ways; but her subsequent conduct shewed no improvement, and he never did take her back. For a period of eleven months from October 22, 1895, he made his wife, through a brother-in-law of hers, who lived in the neighbourhood, a weekly allowance of 8s., at the end

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of which time he was informed that his wife appeared to be in the family way, and was constantly associating with men in public-houses, and especially with one John Humphrey. He thereupon arranged for a meeting with his wife at the house of the before-mentioned brother-in-law. In pursuance of that arrangement he went to the brother-in-law's house, but his wife did not come to meet him. He then informed the brother-in-law that he would no longer contribute to the support of his wife. Subsequently, on the same day, his wife followed him to a public-house in the neighbourhood and asked him why he had stopped her allowance. He then taxed her with infidelity, which she did not deny. She was delivered of a bastard child about three months after that meeting. From the date of that meeting he made her no further allowance, and neither knew nor took any steps to ascertain her whereabouts. The quarter sessions found that Frederick Roff was sincerely attached to his wife, and that, if she had reformed her drinking habits, he would gladly have resumed cohabitation with her. Shortly after the meeting in the public-house she went to reside with the said John Humphrey, and continuously resided with him within the Southwark Union from about September, 1896, to July 19, 1903. On the latter date she was found wandering in the City of London Union in a state of lunacy. On July 29, 1903, she was removed, by order of a justice of the peace of the City of London, as a lunatic to the City of London Lunatic Asylum at Stone, in the county of Kent. On December 18, 1903, the order appealed against was made.

The quarter sessions found as facts that Ellen Roff was deserted by her husband Frederick Roff, and that, after she had been deserted, she had resided for the space of twelve months and upwards in the Southwark Union in such a manner as, had she been a widow, would have rendered her irremovable from that union, and they accordingly affirmed the order of adjudication and dismissed the appeal.

The question for the opinion of the Court was whether there was evidence upon which they could find as aforesaid.

The Divisional Court (Lord Alverstone C.J. and Kennedy J., Ridley J. dissenting) affirmed the decision of the quarter

sessions, being of opinion that the case came within the authority of *Reg. v. Maidstone Union*. (1)

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*J. B. Matthews*, for the appellants. In this case the pauper cannot be said to have been deserted (2) by her husband. The word "desertion," in the ordinary use of language, implies in this connection that the conduct of the husband alleged to have deserted his wife was wrongful or blameworthy. Here the conduct of the pauper rendered it impossible for the husband to live with her. It is difficult to see why the word "deserted" was used in the section, instead of some other term, unless it was intended to be used in the ordinary sense. The enactments creating the status of irremovability were intended to confer a privilege, and it is submitted that the intention could not have been to confer that privilege on a married woman whose conduct has been such as to render it impossible for her husband to live with her. Assuming that a married woman would come within the term "deserted," if her husband, for whatever cause, refused to live with her, and left her without means, so that she would be likely to become chargeable as a pauper, that was not the case here; for the husband allowed the wife 8s. a week in the first instance. Furthermore, he did not contemplate that the separation should be permanent, if she gave up habits of intemperance. If the husband did not desert his wife when they first separated, it cannot be contended that the stoppage of her allowance when he found that she had committed adultery, and while she was living with another man, constituted desertion. This case is distinguishable from *Reg. v. Maidstone Union* (1), for in that case apparently the husband made the wife no allowance, but sent her away under circumstances likely to cause her to become chargeable as a pauper. But, if not distinguishable, it is submitted

(1) 5 Q. B. D. 31.

(2) By s. 3 of the Poor Removal Act, 1861 (24 & 25 Vict. c. 55): "Where a married woman shall have been or shall be deserted by her husband, and shall after his desertion reside for three years" (since reduced to one year by 29 & 30 Vict. c. 113,

s. 17), "in such a manner as would, if she were a widow, render her exempt from removal, she shall not be liable to be removed from the parish wherein she shall be resident, unless her husband return to cohabit with her."



C. A. that that case was wrongly decided, and is not binding upon  
 1906 this Court. That decision was no doubt given some time ago,  
 SOUTHWARK but this is not like a case in which the practice of conveyancers  
 UNION in advising on titles has for a long time been based on a decision,  
 r. or where many commercial transactions have been entered into  
 CITY OF on the faith of the law as laid down in some case which has stood  
 LONDON unquestioned for many years.  
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It is contended that the result of the facts in this case is really to shew that there was a separation of the husband and the wife by agreement.

[He also cited *Reg. v. St. Mary, Islington* (1); *Reg. v. Cookham Union* (2); *Thompson v. Thompson* (3); *Frowd v. Frowd* (4); *Rex v. Flintan*. (5)]

*R. Cunningham Glen*, for the respondents, was not called upon to argue.

VAUGHAN WILLIAMS L.J. If this matter had been *res integra* I am not quite sure that I should have arrived at the same conclusion as was arrived at by Cockburn C.J. and Manisty J. in the case of *Reg. v. Maidstone Union*. (6) I do not think that anyone would say that in this case the wife was "deserted" by her husband in the ordinary sense of the word. I think that word in its ordinary sense, when used with reference to desertion by a husband of his wife or by a wife of her husband, involves that the deserter was doing something wrong. That being so, one would, in dealing with s. 3 of the Poor Removal Act, 1861, which to my mind is a section conferring a privilege upon the married woman, be the more inclined to give that meaning to the word, because one does not very easily come to the conclusion that the Legislature intended to give a privilege to a woman who has grievously misconducted herself. In the case of *Reg. v. Cookham Union* (2) no doubt Cave J. did not put his judgment on quite the same grounds as Field J., but that the latter judge thought the section was meant to confer a privilege is clear from the passage in his judgment where he said: "The object of the Act

(1) (1870) L. R. 5 Q. B. 445.

(2) (1882) 9 Q. B. D. 522.

(3) (1858) 27 L. J. (P. & M.) 65.

(4) [1904] P. 177.

(5) (1830) 1 B. & Ad. 227.

(6) 5 Q. B. D. 31.



is this, that, where a husband has by his desertion of her reduced the wife to the condition of a feme sole, she shall not be deprived of the advantage of gaining a settlement as a feme sole, or be liable to be removed to the place of settlement of a husband who has treated her in that way." There is, however, the decision of the Divisional Court in *Reg. v. Maidstone Union* (1), which was given some twenty-five years ago, and has since been again and again recognized, and from which I do not think that we ought at this time of day lightly to depart. I agree with the appellants' counsel that this is not like the case of a long-standing practice of conveyancers based upon a previous decision, which ought to be followed on the ground that persons have acted on the faith of it, and titles may depend upon it. I do not think that in the present case persons' positions have been changed in that way on the faith of the decision in *Reg. v. Maidstone Union*. (1) Nor can I go the length of saying that there has been such a lapse of time since that decision was pronounced, or such a series of decisions, as to render the doctrine of contemporanea expositio applicable. Nevertheless, one cannot rightly leave out of consideration the fact that the law as to the true construction of the enactment in question has for a long time been established on the footing of the decision in that case. I do not see any objection to my saying that I do not think that I should be prepared altogether to agree with all that was said by Cockburn C.J. in his judgment, but that does not seem to me to be a sufficient reason to justify a departure from the conclusion at which the Court arrived. I do not feel so much difficulty with regard to the judgment of Manisty J., for he put the case in a way which does not seem to me to be open to the same objections that occur to me with regard to the judgment of the Chief Justice. He said: "I think we ought not to put too narrow a construction on 24 & 25 Vict. c. 55, s. 3, and that it must be taken to mean that, where a woman is, whether rightfully or wrongfully, sent away by her husband, so as to be left as a free woman, she can so reside as to gain a settlement apart from him, unless he returns to cohabit with her." That is a very plain and simple rule. It is obvious, I think, that the same

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consideration was present to his mind as was present to the mind of Field J. in *Reg. v. Cookham Union* (1), namely, that the Legislature was by s. 3 of the Poor Removal Act, 1861, intending to confer a privilege on the married woman, but he nevertheless came to the conclusion that, if the husband, whether rightfully or wrongfully, sends the wife away to live apart, he deserts her within the meaning of the section. I am not prepared now to depart from the law so laid down, and, like the majority in the Divisional Court, I feel myself bound by the decision in *Reg. v. Maidstone Union*. (2)

STIRLING L.J. I agree, and have nothing to add.

FLETCHER MOULTON L.J. I am of the same opinion. The judgment of Manisty J. in *Reg. v. Maidstone Union* (2) expresses precisely the view which I take of the section on which this case turns. I think the question whether the desertion was rightful or wrongful has nothing to do with the matter. If we held otherwise, it would make the right of the married woman to a settlement or a status of irremovability, as the case might be, depend upon the rights and wrongs of a matrimonial quarrel, which might have taken place years before. I cannot think that it was the intention of the Legislature to introduce such a complication as that, when assimilating the position of a deserted wife to that of a widow as regards irremovability. It appears to me that the judgment of Manisty J. in *Reg. v. Maidstone Union* (2) was correct, and that we ought to follow that decision.

*Appeal dismissed.*

Solicitor for appellants: *Howard C. Jones.*

Solicitors for respondents: *Rexworthy, Barnard & Co.*

(1) 9 Q. B. D. 522.

(2) 5 Q. B. D. 31.

E. L.

[IN THE COURT OF APPEAL.]

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May 15.

MAYOR, ALDERMEN, AND CITIZENS OF NORWICH  
v. NORWICH ELECTRIC TRAMWAYS COMPANY,  
LIMITED.

*Tramway—Arbitration Clause in Statute—Jurisdiction of High Court ousted  
—Objection to Jurisdiction first taken on Appeal—Tramways Act, 1870  
(33 & 34 Vict. c. 78), s. 33.*

The provision for arbitration contained in s. 33 of the Tramways Act, 1870, ousts the jurisdiction of the High Court with regard to differences coming within the terms of the section.

Where such a provision applies, objection to the jurisdiction of the High Court may be taken on appeal in the Court of Appeal, although it has not been taken at the trial.

It was provided by the special Act of a tramway company, with which, by s. 22 of the Tramways Act, 1870, Parts II. and III. of that Act were to be incorporated, that, if the company failed to maintain and keep in good condition to the satisfaction of the corporation the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation, the corporation might, if they thought fit, themselves at any time, after seven days' notice to the company, do the work necessary for the repair and maintenance of the road, and that the expense reasonably incurred by the corporation in so doing should be repaid to them by the company, with the addition of 5 per cent. on such expense. The corporation did work by way of repair to roads on which tramways belonging to the company were laid, alleging that such work came within the above-mentioned provision, which the company denied. In an action by the corporation against the company to recover the expenses of the work, and for a declaration of their rights in the matter:—

*Held*, that the difference which had thus arisen between the plaintiffs and the defendants came within s. 33 of the Tramways Act, 1870, and therefore the Court had no jurisdiction to entertain the action.

*London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co.*, (1888) 40 Ch. D. 100, distinguished.

APPEAL from the judgment of Phillimore J. in an action tried by him without a jury.

The action was brought by the corporation of Norwich against a tramway company for the recovery of expenses incurred by the plaintiffs in doing certain repairs to roads on which tramways belonging to the defendants were laid, and for a declaration of the plaintiffs' rights as after mentioned.

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By s. 57 of the Norwich Electric Tramways Act, 1897 (60 & 61 Vict. c. ccliv.), it was provided that: "If the company fail to maintain and keep in good condition to the satisfaction of the corporation (1.) so much of any road whereon any tramway belonging to them is laid as lies between the lines of the tramway; (2.) the portion of the roadway between the tramways, where two lines of tramway are laid by the company in any road; (3.) so much of the roadway as extends eighteen inches beyond the rails of and on each side of any such tramway; (4.) the whole width of the roadway, where any tramway shall have been constructed in any street so that a less space than three feet shall intervene between the outside of the footpath on either side of such street and the nearest rail of such tramway; (5.) the junction of the paving laid and maintained by the company with the surface laid and maintained by the corporation, the corporation may, if they think fit, themselves at any time, after seven days' notice to the company, do the work necessary for the repair and maintenance of the road, and the expense reasonably incurred by the corporation in so doing shall be repaid to them by the company with the addition of five per centum on such expense."

It appeared that in certain roads in Norwich tramways belonging to the defendants were laid on granite setts, the roadway on either side being of macadam. The macadam roadway wore out much more rapidly than the granite setts, the result being to produce, as the macadam wore away, a sort of descent or step from the setts on to the macadam. The result was that the line of the setts tended to form a guiding ridge, along which the wheels of vehicles ran, forming a trough, which accumulated water, softening the macadam, and making the trough still deeper. It appeared that the defects in the roadway so caused could be cured, if taken in time, by picking up the old macadam and putting in new metal over a space of about three inches in breadth from the setts. The plaintiff corporation having done repairs to roads, upon which tramways belonging to the defendant company were laid, which repairs had been rendered necessary by the wearing away of the macadam as above described, they sued the defendant company to recover the expenses of



those repairs as coming within s. 57, sub-s. 5, of the Norwich Electric Tramways Act, 1897, and claiming a declaration that "the obligation of the company under s. 57 (5.) of the Norwich Electric Tramways Act, 1897, to maintain and keep in good condition the junction therein mentioned extends to cases where, by reason of the presence of tramways in a road, the traffic in such road has caused the surface laid and maintained by the corporation to become worn down below the level of the paving laid and maintained by the company, and involves the maintenance by the company of a uniform level of such surface and paving, whether that is to be effected by the raising of the surface immediately adjoining such paving or the lowering of the paving itself." The defendant company contended that the proper declaration would be a declaration that "the true meaning of the word 'junction' as used in s. 57 (5.) of the Norwich Electric Tramways Act, 1897, is the line of contact formed by the abutment of a vertical plane, that is to say, the outer surface of the paving laid and maintained by the company, upon a horizontal plane, that is to say, the surface laid and maintained by the corporation, and that the right of the plaintiffs to do and charge for work under the said sub-section does not arise until and unless the level of the paving laid and maintained by the company at its points of junction with the surface laid and maintained by the corporation varies from the level at which such paving was originally laid." Neither in the statement of defence, nor at the trial did the defendants raise the point that the jurisdiction of the High Court was ousted by the provisions of s. 33 of the Tramways Act, 1870. (1) The learned judge gave

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(1) By s. 22 of the Tramways Act, 1870: "Part II. and Part III. of this Act shall apply to every tramway which is hereafter authorized by any provisional order or Act of Parliament, and shall be incorporated with such provisional order or Act, and all the said provisions of this Act, save so far as they shall be expressly varied or excepted by any such provisional order or Act, shall apply to the undertaking authorized thereby,

so far as the same shall be applicable to such undertaking, and shall, with the provisions of every other Act, or part of any Act which shall be incorporated therewith, form part of the said provisional order or Act, and be construed therewith as forming one provisional order or Act, as the case may be." By s. 28: "The promoters shall, at their own expense, at all times maintain and keep in good condition



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judgment for the plaintiffs for the sum claimed, and for a declaration in the form proposed by the plaintiffs, with the exception that he substituted for the words "uniform level" therein the words "uniform and unbroken contour."

*Danckwerts, K.C., and Henlé*, for the defendants. In this case the jurisdiction of the High Court is ousted by s. 33 of the Tramways Act, 1870, which provides that such a difference as arose between the plaintiffs and defendants shall be referred to an engineer or other fit person nominated by the Board of Trade: see the decision of the House of Lords in *Crosfield & Sons v. Manchester Ship Canal Co.* (1) upon a similar provision, and *Reg. v. Croydon and Norwood Tramways Co.* (2) The objection to the jurisdiction may be taken at any time. This is not like a case in which the absence of jurisdiction is not apparent on the

and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway and (where two tramways are laid by the same promoters in any road at a distance of not more than four feet from each other) the portion of the road between the tramways, and in every case so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway." By s. 33: "If any difference arises between the promoters or lessees on the one hand and any local authority or road authority, or any gas or water company, or any company, body, or person, to whom any sewer, drain, tube, wires, or apparatus for telegraphic or other purposes may belong, or any other company, on the other hand, with respect to any interference or control exercised, or claimed to be exercised, by them or him, or on their or his

behalf, or by the promoters or lessees by virtue of this Act, in relation to any tramway or work, or in relation to any work or proceeding of the local authority, road authority, body, company, or person, or with respect to the propriety of or the mode of execution of any work relating to any tramway, or with respect to the amount of any compensation to be made by or to the promoters or lessees, or on the question whether any work is such as ought reasonably to satisfy the local authority, road authority, body, company, or person concerned, or with respect to any other subject or thing regulated by or comprised in this Act, the matter in difference shall (unless otherwise specially provided by this Act) be settled by an engineer or other fit person nominated as referee by the Board of Trade on the application of either party, and the expenses of the reference shall be borne and paid as the referee directs."

(1) [1905] A. C. 421.

(2) (1886) 18 Q. B. D. 39.

face of the proceedings, but depends upon some fact the existence of which is known to the party, and which he fails to bring to the notice of the Court until after the trial. It has been held that in such a case a prohibition may be refused: see *Farquharson v. Morgan* (1); *Broad v. Perkins*. (2) Neglect to take the objection on the pleadings or at the trial cannot in such a case as this give jurisdiction. Sect. 33 of the Tramways Act, 1870, clearly applies to the dispute in question. By s. 22 of that Act, Part II. of the Act, which includes s. 33, and Part III. of the Act are to be incorporated with any tramway Act thereafter passed, and are to be read therewith as forming one Act. Therefore Parts II. and III. of the Tramways Act, 1870, including the provisions of s. 33, must be read as if they were originally inserted in and formed part of the special Act; and the words "this Act" in s. 33 must be read as meaning the special Act, including those provisions. If that be so, it is clear that the difference which has arisen is a difference within the meaning of s. 33. [They also cited *Bristol Trams and Carriage Co. v. Corporation of Bristol* (3); *In re Padstow Total Loss and Collision Assurance Association* (4); *London and North Western Ry. Co. v. Donellan* (5); *Barraclough v. Brown* (6); *Foster v. Usherwood* (7); *Misa v. Currie*. (8)]

*Macmorran, K.C.*, and *E. E. Wild*, for the plaintiffs. There is no case in which it has been held that a defendant who has not pleaded the want of jurisdiction, nor taken objection to the jurisdiction in the Court of first instance, is entitled to object to the jurisdiction in the Court of Appeal. In all the cases referred to the point was taken at an earlier stage. In *Reg. v. Croydon and Norwood Tramways Co.* (9) and *Bristol Trams and Carriage Co. v. Corporation of Bristol* (3), for instance, the objection was taken at the earliest opportunity.

[*VAUGHAN WILLIAMS L.J.* Upon what principle can the failure to take the objection to the jurisdiction at the trial prevent the defendant from raising it at a later stage? It can hardly be put as a case of estoppel.]

(1) [1894] 1 Q. B. 552.

(2) (1838) 21 Q. B. D. 533.

(3) (1890) 25 Q. B. D. 427.

(4) (1882) 20 Ch. D. 137.

(5) [1898] 2 Q. B. 7.

(6) [1897] A. C. 615.

(7) (1877) 3 Ex. D. 1.

(8) (1876) 1 App. Cas. 554.

(9) 18 Q. B. D. 39.

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It may not be a case of estoppel in the strict technical sense of the word. It may be put as a waiver of a provision introduced into a statute for the benefit of the party, and which he may therefore waive.

[VAUGHAN WILLIAMS L.J. The case is not like that of a provision in an agreement which is for the benefit of one of the parties and which he may waive. This is a provision in an Act of Parliament, which, though to some extent it may be for the benefit of the parties to the difference, must be regarded as inserted in the interests of the public also.]

It is submitted that the only parties concerned in the determination of the differences provided for are the local authority on the one hand and the tramway company on the other. [They also cited on this point *London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co.* (1)]

Further, it is submitted that the difference which has here arisen is not one which comes within the terms of s. 33. Sect. 57 of the special Act gives the corporation a right which goes beyond anything contained in the Tramways Act, 1870. It entitles the corporation in certain cases to do work themselves, and gives them a right to recover the expenses of the work. Sub-s. 5 of the section gives them a special right with regard to the repair of the junction of the paving laid by the company with the surface laid by the corporation, which is not given by the general Act; and the question raised is one of law, namely, as to what the meaning of the word "junction" is in that subsection, a question not suitable for reference to an engineer. Sect. 22 of the Act of 1870 cannot be construed as bringing within s. 33 differences as to matters which are introduced de novo by the special Act, and which are not dealt with by or within the purview of the Act of 1870. In many sections of that Act a contrast is made between "this Act" and the special Act: see, for example, s. 33. Although, generally speaking, the two Acts are to be read together, it does not follow that for the purposes of every section of the Act of 1870 in which the expression "this Act" occurs it is to be read as including the special Act. By s. 22 of the Act of 1870 the provisions of that Act are

only to apply so far as not expressly varied by the special Act. It is submitted that s. 57, sub-s. 5, of the special Act gives a right to recover the expenses therein mentioned in the High Court, and that the jurisdiction of the Court is not ousted with regard to the recovery of those expenses. This is not, it is submitted, a difference either "with respect to the propriety of, or the mode of execution of, any work relating to any tramway" or "on the question whether any work is such as ought reasonably to satisfy the local authority." [They also cited *Mayor, &c., of London v. Cox*. (1)]

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*Danckwerts, K.C.*, in reply.

VAUGHAN WILLIAMS L.J. A point as to jurisdiction has been raised on this appeal which was not raised at the trial. It is argued for the defendants that the result of s. 33 of the Tramways Act, 1870, is that this dispute between the plaintiffs and the defendants ought to be disposed of by an engineer or some other fit person nominated by the Board of Trade. The first point made for the plaintiffs in answer to that contention is that it is too late at the present stage of the proceedings to raise this objection to the jurisdiction, and that it ought to have been raised at the trial. I can only say with regard to that point that I have always supposed it to be well-established law that the objection that the tribunal has no jurisdiction to entertain the case is one which, at all events in reference to proceedings in the High Court, may be taken at any time. If the Court in any case is itself satisfied that it has no jurisdiction to entertain the application made, it is its duty, in my opinion, to give effect to that view, taking, if necessary, the initiative upon itself. The plaintiffs' counsel failed, as it appears to me, to produce any authority for the proposition that such an objection to the jurisdiction could only be taken at the trial, for the case of *Mayor, &c., of London v. Cox* (1) has, I think, no application to a case of this kind. In the absence of authority I asked upon what legal principle they based that proposition. The answer was that there was either a waiver or something in the nature of an estoppel. As regards waiver, what is said to have been waived?

(1) (1867) L. R. 2 H. L. 239.



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It is the provision for arbitration in s. 33 of the Tramways Act, 1870, which is a public general Act applying to all the tramways in the kingdom. It is not open to a party to a litigation to waive such a provision, which is not an agreement, even a parliamentary agreement, between parties. The provisions of s. 33 must be taken to have been introduced into the Act for the benefit of the public, and therefore nobody can waive them. In *Reg. v. Croydon and Norwood Tramways Co.* (1) Lord Esher M.R. said with regard to the provisions of s. 33: "This restriction contained in the 33rd section is not upon a particular local authority, it applies to them all; and, when you consider what a number of local authorities there must be in the kingdom, with regard to these tramway roads at the present time, I should have expected that the Act of Parliament would put a bridle upon them to that extent at all events." In that case a question was raised of the very same sort as that which is raised by the present action. It appears to me, therefore, that, the Legislature having in the interests of the public provided that disputes of the kind mentioned in the section shall be determined by an expert nominated by the Board of Trade, the contention that there was a waiver of that provision so as to give jurisdiction to the High Court is not open to the plaintiffs. The same considerations appear to me to apply to the argument that there was something in the nature of an estoppel, which indeed was not very seriously pressed upon us. The case of *London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co.* (2) was cited as shewing that, if an objection to the jurisdiction is not taken at the proper time, it cannot be taken at all. But, when that case is looked at, it will be seen that the Court of Appeal, as appears from the judgment of Bowen L.J., construed the particular enactment there in question, not as ousting the jurisdiction of the High Court, but merely as giving an option to either party of applying to the Court to make an order giving effect to an agreement for arbitration, which order, if applied for at the proper time, the party applying for it would have been entitled to; and it was held that, in the case of such an enactment, a party might be too late in applying for the order, which, if applied

(1) 18 Q. B. D. 39, at p. 42.

(2) 40 Ch. D. 100.



for at the proper time, the Court would have been bound to grant, and which would have relegated the matters in dispute to decision by arbitration. That case has no application to one in which the provisions of a section oust the jurisdiction of the Court without the necessity of any application by either party.

Assuming, therefore, that the objection to the jurisdiction may be taken at the present stage, we have to consider the application of s. 33 in the case before us. I do not think that it was seriously argued by the counsel for the plaintiffs that, if the section applied, it was not a section which ousted the jurisdiction of the High Court by appointing a special tribunal for the settlement of disputes coming within its terms. The contention was that the section did not apply to the dispute in the present case on the following grounds. It was contended that, although s. 22 of the Tramways Act, 1870, provides that "Part II. and Part III. of this Act shall apply to every tramway which is hereafter authorized by any provisional order or Act of Parliament, and shall be incorporated with such provisional order or Act, and all the said provisions of this Act, save so far as they shall be expressly varied or excepted by any such provisional order or Act, shall apply to the undertaking authorized thereby so far as the same shall be applicable to such undertaking, and shall, with the provisions of every other Act or part of any Act which shall be incorporated therewith, form part of the said provisional order or Act, and be construed therewith as forming one provisional order or Act, as the case may be," nevertheless, in dealing with s. 33, a distinction ought to be drawn between the special Act and those provisions of the Tramways Act, 1870, which are so declared to be parts of the special Act; and that contention was based on the contrast which is made between the provisions of the general Act and the special Act here and there throughout the Act of 1870. I must say, speaking for myself, that I do not see how such a distinction can be drawn. I think one must read s. 33 just as if it had been printed as part of the special Act. That being so, I do not think that the contention that s. 33 is only applicable to disputes with regard to matters mentioned in the Act of 1870 is sustainable. The way in which it was sought to work out that contention was as follows.

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C. A. Reference was made to s. 57 of the special Act, which enumerates  
 1906 various duties imposed on the company, and deals with the  
 consequences of failure in performance of them. [The Lord  
 Justice here read s. 57 of the Norwich Electric Tramways Act,  
 1897.] It was said that, though some of the items in the  
 catalogue of duties imposed on the company which is contained  
 in the section substantially refer to matters which are mentioned  
 in s. 28 of the general Act, and therefore fall within s. 33 of  
 that Act, yet, when item 5 is looked at, assuming that a distinction  
 is to be drawn for this purpose between the general Act  
 and the special Act, that item is not one which falls within the  
 area of the duties imposed upon the company by s. 28 of the  
 general Act, and that under those circumstances s. 33 has no  
 application to the matters to which that item refers. In so far  
 as this argument is based on a distinction to be drawn between  
 the special Act and that part of the general Act which is to be  
 read as part of the special Act, I have already said that I think  
 there is no foundation for it. But I go further than that. In  
 my opinion item 5 really only deals with duties which are part  
 and parcel of the duties already imposed on the company by  
 s. 28 of the general Act. It only remains to deal with the  
 operation of s. 33. In my judgment, by appointing a special  
 tribunal to deal with disputes of this kind, the section has to  
 that extent ousted the jurisdiction of the High Court. It seems  
 to me that the decision of the House of Lords in *Crosfield & Sons*  
*v. Manchester Ship Canal Co.* (1), so far as it concerned the  
 corporation as distinguished from the traders, is really conclusive  
 to the effect that in the present case the jurisdiction of the High  
 Court is ousted. I therefore think that the appeal must be  
 allowed.

STIRLING L.J. I am of the same opinion. It appears to me  
 that, with regard to disputes falling within it, s. 33 of the Tram-  
 ways Act, 1870, ousts the jurisdiction of the Court. That section  
 in its terms closely resembles the enactment which was the sub-  
 ject of decision in the case of *Crosfield & Sons v. Manchester*  
*Ship Canal Co.* (1), and is totally different from that which was

(1) [1905] A. C. 421.

considered in *London, Chatham and Dover Ry. Co. v. South Eastern Ry. Co.* (1) I may add that in my opinion, as regards this point, the case is governed by the decision in *Reg. v. Croydon and Norwood Tramways Co.* (2) I think that both on principle and on authority we must hold that the jurisdiction of the High Court is ousted. It is true that the objection to the jurisdiction is taken at a very late stage in the case; and it is contended for the plaintiffs that, as it was not taken in the pleadings or before the Court of first instance, it ought to be disregarded. I fail to see how that can be so. It appears to me that such an objection to the jurisdiction may be raised at any time, and I cannot see how it is possible to hold that the defendants have waived that objection, so as to prevent their now raising it. I agree with what my brother Vaughan Williams L.J. has said on this subject.

The only remaining question is whether the matter here in dispute comes within s. 33. One view which may be taken as to that question, and which was put before us by the defendants' counsel, rests upon the language of s. 22 of the Tramways Act, 1870, which incorporates into the special Act Parts II. and III. of the Act, and directs that they shall form part of the special Act and be construed therewith as forming one Act. It does not seem to me to be necessary here to decide whether that view of the case is correct, though I do not desire to be understood as saying that it is not well founded. I should say that the question raised by this action falls within two of the classes of matters expressly mentioned in s. 33, namely, differences "with respect to the propriety of, or the mode of execution of any work relating to any tramway," and differences "on the question whether any work is such as ought reasonably to satisfy the local authority, road authority, body, company, or person concerned." On that ground it appears to me that the dispute in this case is not one which ought to be decided by the High Court. It was argued, lastly, that s. 57 of the special Act conferred express rights on the corporation, which are at variance with the provisions of s. 33. I fail to see that this is so. All that s. 57 provides is that in certain cases the local authority may do the

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(1) 40 Ch. D. 100.

(2) 18 Q. B. D. 39.

C. A. 1906 <hr/> NORWICH CORPORATION v. NORWICH ELECTRIC TRAMWAYS COMPANY, LIMITED. <hr/> Stirling L.J.	work themselves, and the expenses reasonably incurred by them in doing it shall be repaid to them by the company. But, if there is a dispute as to whether the company have brought themselves within the provision of that section, or whether the expenses incurred by the corporation have been reasonably incurred, I think that such a dispute comes within the terms of s. 33 of the Act of 1870, and must be decided as provided by that section. On these grounds I think the appeal should be allowed.
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FLETCHER MOULTON L.J. I agree. The only point upon which I wish to add anything is as to the construction of s. 33 of the Tramways Act, 1870. I do not, as at present advised, think that the effect of the provisions of s. 22, which incorporates Parts II. and III. of the Act of 1870 with the special Act, is that the words "this Act" in s. 33 must be read as meaning the compound Act made up of the special Act and the parts of the general Act incorporated therewith. In my opinion those words must be read as meaning the general Act itself; but it is not necessary to decide the point for the purposes of this case, because in my opinion the provisions of sub-s. 5 of s. 57 of the special Act are only a particular instance—in this case embodied in the special Act—of such an agreement as is contemplated by s. 29 of the Act of 1870, and as the local authority and the tramway company are authorized, and one may almost say expected, to make. If so, the general words of s. 33 are amply sufficient to cover the dispute in the present case; and, as the words of that section with regard to reference of such disputes are peremptory, the jurisdiction of the Court is ousted, and the Court is bound to give effect to the objection as soon as the absence of jurisdiction is brought to its notice.

*Appeal allowed.*

Solicitors for appellants: *Sharpe, Parker & Co., for A. H. Miller, Norwich.*

Solicitors for respondents: *Crowders, Vizard & Co., for Mills & Reeve, Norwich.*

E. L.



[IN THE COURT OF APPEAL.]

*In re* BLAIR & GIRLING.

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April 24;  
May 14.

*Solicitor—Costs—Taxation—Stamp Duty on Capital of Company—Payment by Solicitor—“Disbursement”—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 112—Finance Act, 1899 (62 & 63 Vict. c. 9), s. 7—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37.*

A payment by a solicitor, who is instructed by the promoter of a company to act for him in relation to the formation and registration of the company under the Companies Acts, of the stamp duty payable on the registration of the company on the amount of its nominal share capital under s. 112 of the Stamp Act, 1891, as extended by s. 7 of the Finance Act, 1899, ought not to be included in the solicitor's bill of costs as a “disbursement” within the meaning of s. 37 of the Solicitors Act, 1843, but should be entered in the cash account.

APPEAL from the refusal by Channell J. at chambers to order a review of taxation of costs.

Messrs. Blair & Girling, a firm of solicitors, were retained by one Moore, on behalf of the promoters of an intended company, to act for them in relation to the formation and registration with limited liability of the company under the Companies Acts. The solicitors did the necessary work in connection therewith, and paid the stamp duties payable on the registration of the company, including 18*l.* 15*s.* on the memorandum of association, 10*s.* on the articles of association, and 150*l.* being the ad valorem stamp duty payable on the statement of the amount of the nominal share capital of the company under s. 112 of the Stamp Act, 1891, as extended by s. 7 of the Finance Act, 1899.

The solicitors delivered a bill of costs, and also a cash account, and the above sum of 150*l.* was included in the bill of costs as a disbursement. The total amount of the bill of costs as delivered was 525*l.* 13*s.* 7*d.* Upon taxation the taxing Master disallowed the item of 150*l.* as being improperly entered in the bill of costs, and transferred it to the cash account, thus reducing the bill of costs to 375*l.* 13*s.* 7*d.*, and from the bill so reduced he taxed off the sum of 83*l.* 5*s.* 7*d.*, being more than one-sixth part thereof. The solicitors in consequence became liable under



C. A. s. 37 of the Solicitors Act, 1843, to pay the costs of the taxation.  
 1906 The solicitors carried in objections to the disallowance by the  
 BLAIR & GIRLING, taxing Master of the item of 150*l.* in the bill of costs, upon the  
*In re.* grounds that the payment of that sum was made in pursuance of  
 the professional duty undertaken by them which they were bound  
 to perform, and also that the payment was sanctioned as a pro-  
 fessional payment by the general and established custom and  
 practice of the profession, and that therefore it ought to have been  
 allowed as a disbursement in the bill of costs. In support of  
 the objections the solicitors referred to the opinion of the Council  
 of the Incorporated Law Society pronounced on December 9,  
 1898, and contained on p. 93, par. 334, of Practice and Usage in  
 the Solicitor's Profession, published in 1900, and reprinted in  
 1905 (1); and they also relied upon an affidavit by their  
 managing clerk, which stated that he had made inquiries  
 of certain firms of solicitors in the City of London who had  
 considerable experience in the registration of joint stock com-  
 panies, and he was informed that it was the invariable practice  
 in their offices to include in the bills of costs the fees paid by  
 them upon the registration of public companies, and not to put  
 such items in the cash account, and that from his own knowledge  
 and experience he believed the above to be the invariable practice  
 of solicitors.

The taxing Master's answers to the objections were as follows :  
 "In my opinion this point is governed by *In re Kingdon & Wilson*. (2) The ad valorem duty in this case is a stamp duty  
 originally imposed by the Stamp Act, and since twice increased  
 by the Finance Acts of 1896 and 1899, and the solicitor is acting  
 as agent for his client in paying this sum and not as solicitor.  
 The amount is very large, and as might not unreasonably be  
 expected the inclusion or exclusion of this large sum governs  
 the incidence of the costs of this taxation, and such a result, as  
 was pointed out in *In re Kingdon & Wilson* (2), is undesirable.

(1) Paragraph 334 is as follows :—  
 "In reply to an inquiry the Council  
 expressed the opinion that the stamps  
 and fees payable on the registration  
 of a company are disbursements

proper to be included in a solicitor's  
 bill of costs, as opposed to his  
 cash account. *Opinion of Council*,  
*December 9, 1898.*"

(2) [1902] 2 Ch. 242.

The opinion of the Law Society to which I have been referred was given before the case of *In re Kingdon & Wilson* (1) was decided, and I cannot think either that by the words 'stamps and fees therein referred to, the committee of the society intended to include an ad valorem duty of this description, and I cannot come to the conclusion either that a payment of this sort comes within the certificate given by the taxing Masters in *In re Remnant* (2) referred to in *In re Kingdon & Wilson*. (1) This case is also somewhat out of date as regards modern practice, and, even if the item comes within the language of the certificate I have referred to, which I do not think it does, it certainly does not come within its spirit. I, therefore, overrule the objections."

The solicitors applied to Channell J. at chambers for an order to review the taxation, but the learned judge dismissed the application. The solicitors appealed.

During the arguments in the Court of Appeal, when the question arose as to whether the payment of this ad valorem stamp duty on the capital of the company was sanctioned as a professional payment by the general and established custom and practice of the profession within the decision in *In re Remnant* (3), the Court said that they would consult the taxing Masters and ask them to give a certificate upon the matter. The taxing Masters gave the following certificate: "In compliance with your Lordships' directions, the taxing Masters beg respectfully to state that the practice as to the payments by a solicitor proper to be included in his bill of costs remains the same as it was certified to be in *In re Remnant*. (3) For a time the practice in the taxing office was unsettled by the decision in *In re Lamb* (4), but the Court of Appeal, in *In re Kingdon & Wilson* (1), restored the practice, and *In re Buckwell & Berkeley* (5) confirmed it on what the taxing Masters venture to think are the proper lines and in accordance with the ordinary business relations between a solicitor and his client. The taxing Masters are of opinion that the duty payable on registration of a joint stock company in

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(1) [1902] 2 Ch. 242

(3) 11 Beav. 603.

(2) (1849) 11 Beav. 603, at p. 613.

(4) (1889) 23 Q. B. D. 5.

(5) [1902] 2 Ch. 596.

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respect of its capital is not an ordinary professional disbursement such as a solicitor can be required by his client to make. He is not bound to find the money, but if he does, the disbursement is properly and usually included in his cash account, and not in his bill of costs. The taxing Masters certify that this is and has been the practice and custom in cases coming before the taxing Masters, and the cases where a solicitor has sought to introduce the amount into his bill of costs are extremely rare. The inclusion of the amount in the bill of costs would in most cases throw the costs of taxation in any event on the client, and in such cases would impose on the client a tax of 2l. 10s. per cent. on the duty, that being the taxing fee on a bill of costs; while, if the amount is in the cash account as a receipt, the taxing fee is 1s. per cent."

April 24. *Gore-Browne, K.C.*, and *Norman Craig*, for the solicitors. The payment by the solicitors of the stamp duty of 150l. on the amount of the nominal share capital of the company was properly included by them in their bill of costs, and not in their cash account. They were instructed to register the company, and having accepted those instructions their duty was to take all steps and to make all preliminary payments necessary to get registration of the company completed. The payment of this stamp duty is a condition precedent to the registration of a company. Therefore the payment was made "in pursuance of the professional duty undertaken by" the solicitors, and which they were "bound to perform," within the first branch of the rule laid down in *In re Remnant* (1) as to what ought to be entered as a professional disbursement in the bill of costs. It is a necessary incident of the solicitors' instructions to register the company that they should pay this stamp duty. It is therefore a "disbursement" within the meaning of s. 37 of the Solicitors Act, 1843, and is properly included in their bill of fees, charges and disbursements, and not in their cash account. It is like the stamp duty on a conveyance, which the solicitor is expected to pay for his client, and which is always allowed as a professional payment. No doubt a solicitor is not bound to pay this stamp

(1) 11 Beav. 603, at p. 613.

duty out of his own pocket in the first instance, any more than he is bound to pay counsel's fees out of his own pocket. But that does not make it any the less a payment in pursuance of the professional duty undertaken by him, which he is bound to perform. Counsel's fees are clearly professional disbursements to be entered in bills of costs, and so also is the amount of this stamp duty. "Bound to perform" only means that the solicitor is expected to make the payment unless he informs his client that he will not do so until he is put in funds by the client. The true principle is that anything in the nature of a loan by the solicitor to his client is not a professional disbursement, and must be brought into the cash account and not into the bill of costs. For instance, payment by the solicitor for his client of the purchase-money of an estate would obviously be in the nature of a loan to the client, and not a professional payment. But any sum which the solicitor pays in the ordinary course of his employment as a solicitor is a professional disbursement, as, for instance, in the case of a purchase, sums paid for stamp duty and scrivener's charges would be professional payments. In *In re Kingdon & Wilson* (1), upon which the taxing Master relied, the Court of Appeal, overruling *In re Lamb* (2), held that a payment for estate duty ought not to be included as a disbursement in the bill of costs. But that decision proceeded mainly upon the ground that before *In re Lamb* (2) it was the settled practice not to include sums paid for probate duty in bills of costs, and that many eminent solicitors since that case adhered to the old practice. That case, therefore, did not lay down any principle, and *In re Buckwell & Berkeley* (3) simply followed it. In *In re Grant, Bulcraig & Co.* (4) it was held that the deposit of 5*l.* paid into Court on the presentation of a bankruptcy petition was properly entered as a disbursement in the bill of costs. This payment of 150*l.* stands in no different position, except as regards amount, from the payments of 18*l.* 15*s.* and 10*s.* made on the registration of the memorandum and articles of association respectively, both of which have been allowed in the bill of costs.

Secondly, the payment of this stamp duty also comes within

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(2) 23 Q. B. D. 5.

(3) [1902] 2 Ch. 596.

(4) [1906] 1 Ch. 124.



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the second branch of the rule laid down in *In re Remnant* (1) as being sanctioned as a professional payment by the general and established custom and practice of the profession. The opinion of the Council of the Incorporated Law Society, in the book published by them, entitled *Practice and Usage in the Solicitor's Profession*, p. 93, par. 334, shews that it is the custom of solicitors to charge this class of stamp duty in their bill of costs as a disbursement. That opinion was first pronounced in 1898, before the decision in *In re Kingdon & Wilson* (2), but was reprinted unchanged in 1905 after that decision. That shews that in the opinion of the Law Society the practice in this respect has not been altered by that decision. The affidavit of the solicitors' managing clerk also shews that it is the custom of solicitors to charge this payment in the bill of costs, and not in the cash account. The order of the learned judge was therefore wrong, and the taxing Master ought to be directed to review the taxation in respect of this item.

*Montague Lush, K.C.*, and *H. M. Giveen*, for the respondent. Unless there is a well-established custom among solicitors, acquiesced in by their clients on taxation, to enter a payment for stamp duty on a company's capital in the bill of costs as a disbursement, such a payment cannot possibly be treated as a professional disbursement. At the present time when the capital of companies is so large the stamp duty will be correspondingly high, and it would be absurd to say that a client expects the solicitor to pay the amount in the first instance out of his own pocket. It is not in its nature a professional disbursement. Nor is there any evidence of a custom assented to by the client and adopted on taxation.

VAUGHAN WILLIAMS L.J. We will ask the taxing Masters to report to us as to the practice in the taxing office.

The case accordingly stood over for this purpose, and the taxing Masters' certificate was given as above set out.

May 14. *Gore-Browne, K.C.*, and *Norman Craig*, for the solicitors. The practice of the taxing Masters cannot determine

(1) 11 Beav. 603, at p. 613.

(2) [1902] 2 Ch. 242.

the construction of the word "disbursements" in s. 37 of the Solicitors Act, 1843. The general practice of the profession would help the Court to decide the question. As a general rule the taxing Masters can see from the number of bills brought before them what is the custom of the profession as to entering a particular item in the bill of costs as distinguished from the cash account. But this item of stamp duty on the capital of a company seldom if ever comes before the taxing Masters, and therefore they have no means of judging what is the custom and practice of the profession. For this reason it is all important to see what is the practice of solicitors who are concerned in the registration of companies, and leave should be given to bring further evidence upon this point before the Court.

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VAUGHAN WILLIAMS L.J. Owing to what fell from the learned counsel for the solicitors we have obtained a certificate from the taxing Masters, and it is sufficient to say that the taxing Masters do not recognize the learned counsel's contention as correct. The question arises in this case, as it has arisen in many others, as to what is a professional disbursement. Sect. 37 of the Solicitors Act, 1843, deals with disbursements which are properly placed in a bill of costs, and it provides that "no attorney or solicitor, nor any executor, administrator, or assignee of any attorney or solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor" until the expiration of one month after the bill has been delivered. I do not think that it is disputed that these words mean that the business must be done by the attorney or solicitor as such. That being so, the question has arisen whether this large payment in cash has been made by the solicitors in their professional character as solicitors, or whether it has been made by them as agents independently of that character, just as a banker or any other agent might make disbursements for a client. I quite agree with the observation that it makes no difference whether the money is or is not in fact supplied in the first instance by the client to his solicitor for the purpose of the latter making the payment. We

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have simply to consider whether this payment is a professional disbursement or not. I cannot doubt in the particular case before us of the payment of stamp duty on the capital of a company when the company is registered that *prima facie* it is not a professional disbursement. One of the matters which I take into consideration in arriving at that conclusion is the quantum of the payment, but it is not the sole consideration which leads me to that conclusion. It does not seem to me, as I have said, to be a disbursement which *prima facie* is a professional disbursement made by the solicitors.

It was then suggested that, if that were so, custom has established the contrary, that is to say, that by the custom and practice of solicitors this particular disbursement has been treated as a professional disbursement as between solicitor and client. I do not think that that proposition has been established. In the first place, the affidavit as to the practice of solicitors which has been filed in support of this proposition does not, in my opinion, establish the custom. It shews, no doubt, that very often solicitors put this payment into their bill of costs as distinguished from their cash account, but one must recollect that in all those cases where the bill of costs is not submitted to taxation it makes no difference to the client whether the payment appears in the bill of costs or in the cash account. He has to pay it in any case, and I do not think that we ought to draw the inference that there is any such custom merely because many solicitors habitually insert this particular payment in their bill of costs. If, on the other hand, a particular disbursement has appeared in bills of costs which have gone to taxation, and that disbursement has been habitually treated upon taxation as an item properly introduced into the bill of costs, then I think that that would go far to establish such a custom. I cannot find in the present case any sufficient evidence to establish this custom. To my mind the certificate of the taxing Masters is correct. To put it shortly, the ground of my decision is that *prima facie* this particular disbursement is not a professional disbursement, and the solicitors have failed to prove that there is any custom which has established that, as between solicitor and client, this particular disbursement is properly included as a disbursement in the bill

of costs as distinguished from the cash account. For these reasons, in my opinion, the appeal must be dismissed.

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STIRLING L.J. I am of the same opinion. The substantial contention on the part of the appellants was that this particular disbursement is such a payment in the general course of business between solicitor and client as the solicitor is looked upon by custom as being bound to make within the meaning of the rule in *In re Remnant*. (1) As to that the answer seems to me to be very short. If we look at the affidavit which was filed in support of this contention, it does not establish the custom; and in order that there might be no mistake about it we asked the taxing Masters to give us a certificate on the subject, and that certificate does not help the appellants' case. The appeal therefore fails.

FLETCHER MOULTON L.J. I am of the same opinion. I must say that I find the principle laid down in *In re Remnant* (1) very difficult of application, but applying it as best I can I think that on the whole it puts the onus on the solicitors to prove that this item is rightly included in the bill of costs. Now they seem to me to have filed no evidence to establish that, and therefore as the onus is on them, and as there is an absence of relevant evidence directed to the material point in support of their case, I am opinion that the appeal must fail.

*Appeal dismissed.*

Solicitors for appellants: *Blair & W. B. Girling.*

Solicitors for respondent: *Statham, Rose & Co.*

(1) 11 Beav. 603, at p. 613.



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April 10.

THE WAKEFIELD AND DISTRICT LIGHT RAILWAYS  
COMPANY *v.* THE WAKEFIELD CORPORATION.

*Rates—General District Rate—Assessment—“Land used only as a Railway”—Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 211, sub-s. 1 (b)—Light Railways Act, 1896 (59 & 60 Vict. c. 48), s. 12, sub-s. 2.*

A company were the owners of a light railway constructed under an Order made under the Light Railways Act, 1896. The railway was laid along certain open streets, and the Order provided that nothing therein was to abridge the right of the public to pass along or across the streets in which the railway was laid with carriages not having flange wheels, but that the company should have the exclusive right of using carriages with flange wheels on the railway. The company having been assessed to the general district rate in respect of their occupation of the railway:—

*Held*, that the fact of the public using the surface of the streets in which the rails were laid in the exercise of their ordinary right of passage over the highway did not prevent the land so occupied by the rails from being “land used only as a railway” within the meaning of s. 211 of the Public Health Act, 1875; and that, having regard to the language of s. 12 of the Light Railways Act, 1896, the railway, although made under an Order, was a “railway constructed under the powers of an Act of Parliament for public conveyance” within the meaning of the said s. 211; and that the company were consequently entitled to be assessed to the general district rate in respect of the said railway at one-fourth only of its net annual value.

CASE stated by justices of Wakefield.

A complaint was preferred by the Wakefield Corporation against the appellants, the Wakefield and District Light Railways Company, for non-payment of two general district rates made by the corporation on May 10, 1904, to which the appellants were assessed in the sums of 31*l.* 9*s.* 6*d.* and 8*l.* 12*s.* 8*d.* respectively.

At the hearing of the said complaint it was proved or admitted that the said rates were duly made and demanded of the appellants, and that the appellants were therein rated in respect of certain light railways described in the rates as lines of rails. The said rails were laid and situate in certain public streets; the net annual value of the rails was 237*l.*, and the sums of 31*l.* 9*s.* 6*d.* and 8*l.* 12*s.* 8*d.* charged against the appellants in the said rates were calculated on the full net annual value of 237*l.* It was further proved that the appellants had tendered to the respondents the

sum of 10*l.* 0*s.* 7*d.*, being the total sum charged by the said rates calculated on one-fourth part only of the said net annual value, and that the respondents had refused to accept the same. It was admitted that the appellants were in occupation of the said lines of rails and the land occupied thereby.

The said lines of rails comprise railways Nos. 3, 6, 7, and 8 authorized by clause 10 of the Wakefield and District Light Railways Order, 1901, and lie entirely in certain streets within the city of Wakefield, which are highways dedicated to the public and repairable by the inhabitants at large, and are vested in the corporation of Wakefield as the urban authority pursuant to the Public Health Act, 1875. The traffic along the said lines of rails is worked by electricity on what is commonly called the overhead system, the current being conveyed to the vehicles travelling along the said lines of rails by wires suspended from posts placed alongside of the said roads. The vehicles are used for the conveyance of passengers and parcels, and the public are entitled to be conveyed along the lines of rails on payment of the rates and charges authorized by the said Order.

It is provided by s. 17 of the said Order that "Nothing in this Order or in any by-law made under this Order shall take away or abridge the right of the public to pass along or across every part of any road along or across which the railway is laid with carriages not having flange wheels or wheels suitable only to run on the rails of the railway."

By s. 49: "The company may use on the railway carriages with flange wheels or wheels suitable only to run on the rails of the railway, and subject to the provisions of this Order the company shall have the exclusive use of the railway for carriages with flange wheels or other wheels suitable only to run on the rails of the railway."

By s. 50: "If any person (except by agreement with the company or otherwise as by this Order provided) uses the railway or any portion thereof with carriages having flange wheels or other wheels suitable only to run on the rails of the railway such person shall for every such offence be liable to a penalty not exceeding twenty pounds."

It was contended on behalf of the appellants that the said lines

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of rails and the land occupied thereby were used "as a railway constructed under the powers of" an "Act of Parliament for public conveyance" within the meaning of s. 211 of the Public Health Act, 1875 (1), because they were constructed and used only under the said Wakefield and District Light Railway Order, which Order is "to be deemed a special Act by virtue of s. 12 of the Light Railways Act, 1896, for the purposes of the general enactments relating to railways, and that therefore the appellants ought to be assessed in respect of the said lines of rails and the land occupied thereby in the proportion of one-fourth only of the net annual value thereof.

The justices held that the land occupied by the said lines of rails was not land used only as a railway, and that the said railways were not railways constructed under the powers of an Act of Parliament for public conveyance, and that the appellants were liable to be assessed in respect thereof on the full net annual value.

*W. Ryde (Danckwerts, K.C., with him), for the appellants.* By s. 211, sub-s. 1, of the Public Health Act, 1875, which deals with the assessment of general district rates, it is provided that: (b) "The occupier of any land used as arable, meadow, or pasture ground only . . . or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance," shall be assessed at only one-fourth of the value. It is conceded that the word "only" is to be read along with the word "railway" as well as with the words "canal or towing path." But here the land, in respect of which alone the company were rateable, was used only as a railway. The word "used" means "used by the person to be rated." Whether it is also used by other persons for another

(1) Sect. 211 of the Public Health Act, 1875, provides, with respect to the assessment of general district rates:

Sub-s. 1 (b): "The occupier of any land used as arable, meadow, or pasture ground only, or as woodlands, market gardens, or nursery grounds, and the occupier of any land covered

with water, or used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof."

purpose is immaterial. The mere fact that the public have a right of passage over the locus in quo cannot deprive the occupier of his privilege to be assessed at the lower value. For if it could, the inclusion of a "towing path" in the list of privileged land would be unmeaning, it being a matter of common knowledge that there is no such thing as a canal towing path which is not also used as a public footpath. But, further, that in respect of which the company are really rateable is not the surface of the rails or of the roadway between them, over which the public have a right of passage under s. 17 of the Order of 1901, but the grooves of the rails in which the flange wheels run, and of which by s. 49 the company are given the exclusive occupation, and from the use of which the public are by s. 50 excluded under a penalty: *Pimlico Tramway Co. v. Greenwich*. (1) Those grooves are used only as a railway.

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Secondly, these railways were "constructed under the powers of an Act of Parliament." By s. 12, sub-s. 2 (2), of the Light Railways Act, 1896 (59 & 60 Vict. 48), it is provided that "the general enactments relating to railways shall apply to a light railway under this Act in like manner as they apply to any other railway; and for the purposes of those enactments and of the Clauses Acts, so far as they are incorporated or applied by the order authorizing the railway, the light railway company shall be deemed a railway company, and the order under this Act a special Act, and any provision thereof a special enactment." Therefore these light railways, though made under an Order, are deemed to be made under the powers of an Act of Parliament. For although the Public Health Act is not a general Act relating to railways, but relates to public health,

(1) (1873) L. R. 9 Q. B. 9.  
(2) By s. 12, sub-s. 2, of the Light Railways Act, 1896: "Subject to the foregoing provisions of this Act and to any special provisions contained in the order authorizing the railway, the general enactments relating to railways shall apply to a light railway under this Act in like manner as they apply to any other

railway; and for the purposes of those enactments, and of the Clauses Acts so far as they are incorporated or applied by the order authorizing the railway, the light railway company shall be deemed a railway company, and the order under this Act a special Act, and any provision thereof a special enactment."



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yet s. 12 of the Act of 1896 draws a distinction between "Acts" and "enactments." And s. 211 is a "general enactment relating to railways"; and for the purposes of that enactment the Order is deemed to be a special Act.

*Clavell Salter, K.C.*, and *W. Mackenzie*, for the respondents. This is not land used only as a railway. A light railway which runs along the centre of a public road is much more like a tramway than an ordinary railway which runs on private land enclosed between fences, and it has been held that a tramway is not entitled to the privilege of a railway under s. 211 of the Public Health Act: *Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority*. (1) The object of s. 211, sub-s. 1 (b), was to exempt from assessment on the full value those classes of property which did not derive a full share of the benefits arising from the expenditure of the rates on police, lighting, &c. But in the case of such railways as these running through the open streets a full share of the benefits is enjoyed, and there is no reason for exemption from the full contribution.

Secondly, assuming these light railways to be used only as railways within the meaning of s. 211, they are not constructed under an Act of Parliament. The words "general enactments relating to railways" mean public Acts relating to railways, such as the Regulation of Railways Act; they do not include an isolated section picked out of an Act relating to a different subject-matter. And the provision that the Order shall be deemed to be a special Act is qualified by the words "for the purposes of those enactments," which expression in its natural sense does not include s. 211 of the Act of 1875.

*Ryde* was not called on to reply.

RIDLEY J. In this case the question raised for our decision is whether certain light railways made under the Wakefield and District Light Railways Order, 1901, were land used "as a railway constructed under the powers of an Act of Parliament for public conveyance" within the meaning of s. 211 of the Public Health Act, 1875, so as to entitle the railway company to be assessed in respect of them upon one-fourth only of their net

(1) [1892] 1 Q. B. 357.

annual value. The justices held that the land occupied was not land used only as a railway, and that the railways were not constructed under the powers of an Act of Parliament. We have now to decide whether the justices in so holding were right. The words of s. 211, sub-s. 1 (b), so far as they are material, are "any land . . . used only as a canal or towing path for the same, or as a railway constructed under the powers of any Act of Parliament for public conveyance." It was held by Wills J. in *Swansea Improvements and Tramway Co. v. Swansea Urban Sanitary Authority* (1) that the word "only" must be read along with "railway" as well with "canal or towing path," and Mr. Ryde concedes that that decision is binding on him here. Then, was this land used only as a railway? No doubt the section was drawn for the purpose of dealing with the case of an ordinary railway where the land is fenced on both sides and is owned by the railway company. But here we have to deal with a railway which, so far as outward appearance goes, is indistinguishable from a tramway, in that it runs along a public street, and that foot passengers and vehicles have a right to pass to and fro along and across it. I had considerable doubt whether, having regard to the rights which the public exercise over it, this light railway ought not rather to be classed with tramways than with railways. But, as Mr. Ryde has pointed out, the only thing in respect of which the railway company is rateable is the metal rails, or rather the slit or groove in the rails of which they have the exclusive right of user, and that slit is used only for the purpose of a railway. On the whole, therefore, I think that the appellants are right on that point. On the other point, as to whether the railways were constructed under the powers of an Act of Parliament, I have not felt so much difficulty. They were no doubt made under an Order, not under an Act. But s. 12 of the Light Railways Act, 1896, gets over that difficulty, for it says that for the purposes of "the general enactments relating to railways the" Order shall be deemed to be a special Act; and I think that s. 211 of the Public Health Act is a general enactment relating to railways. The word "enactment" does not mean the same thing as "Act." "Act" means the whole Act, whereas a section or part of a section in an Act may be an

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enactment. I think the justices were wrong in the view which they took, and that the appellants are entitled to the exemption claimed.

DARLING J. I am of the same opinion. I do not propose to say anything about the second point, but only upon that which arises upon the construction of s. 211 of the Public Health Act. As to that my view is this: The appellants may use the roads in question as all other persons may, and in respect of that user they could not be rateable. The reason why they are rateable is that, unlike others, they have the exclusive use of some land on which they have been permitted to lay down a railway and the necessary appurtenances of a railway. That railway they alone may use as a railway; all other persons are forbidden so to use it. Therefore all that land or thing for which the appellants are rateable is used only as a railway. It is true that people may cross the line of rail and even run along it with their carts if their wheels happen to be of the right gauge, but they cannot do so in the same way that the appellants can, because they may not use flange wheels. This kind of use of the land occupied by a railway by others happens, though in a less degree, in every case of a level crossing; and if all the level crossings upon one of the large railways were added together they would amount to a very considerable length of line. But it has never been suggested that the fact of the public having the right to traverse the railway on the level deprives the railway company of the right to be rated in respect of those crossings at the lower value.

A. T. LAWRENCE J. I am of the same opinion. I think that the exemption in s. 211 applies. I do not think it is a plain case at all, but on the whole I think that the appellants' contention is right. When you look at the property specified in the rate-book it is described as lines of rails. Are they property which is used only as a railway? I think they are. It is quite true that persons pass over them in the exercise of their rights of passage over the highway, but that does not prevent their being used only in their character of railways by the company. It is that exclusive right of user which the company possess that makes them rateable at all. It seems to me impossible to say that they have an exclusive right to use the rails as a railway which

makes them rateable and at the same time to say that they are not the only persons who use the rateable hereditament. With reference to the other question as to whether the railways were constructed under the powers of an Act of Parliament, it seems that s. 211 of the Public Health Act, 1875, is a "general enactment relating to railways" within the meaning of s. 12 of the Light Railways Act, 1896, and that that latter section consequently does have the effect of making this Order an Act of Parliament and of making these lines railways constructed under the powers of an Act of Parliament.

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*Judgment for the appellants.*

Solicitors for appellants: *Ashurst, Morris, Crisp & Co.*

Solicitors for respondents: *Sharpe, Parker, Pritchards & Barham.*

J. F. C.

NEWPORT UNION, APPELLANTS v. STEAD, RESPONDENT.

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NEWPORT UNION, APPELLANTS v. GREEN, RESPONDENT.

*April 25, 26.*

*Poor Rate—Rateable Value—Necessary Expense to command Rent—Rent-charges imposed for Protection of Lands from Inundation—Parochial Assessment Act, 1836 (6 & 7 Will. 4, c. 96), s. 1.*

In a district under the jurisdiction of commissioners of sewers rent-charges were imposed on certain hereditaments for the maintenance of works necessary for protecting the district from incursions of the sea. The rent-charges were imposed on some only of the hereditaments in the district, although other hereditaments were equally benefited by the protection works:—

*Held*, that in arriving at the rateable value of the hereditaments which were subject to the burden of the rent-charges, the amount of those rent-charges could not be deducted as an expense necessary to maintain the property in a state to command the rent thereof within s. 1 of the Parochial Assessment Act, 1836.

Whether some deduction ought not to be allowed in respect of the liability to maintain such protection works, *quære*.

*Reg. v. Vunge*, (1842) 3 Q. B. 242, followed.

CASES stated by Monmouthshire Quarter Sessions.

NEWPORT UNION v. STEAD.

Upon the hearing of an appeal by the respondent Stead against a rate made for the relief of the poor of the parish of



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Nash, Monmouthshire, the following facts were admitted or proved:—

Moorbarn Farm, in the parish of Nash, was the property of the Provost and Fellows of Eton College, and at the time of the making and during the currency of the rate in question the respondent was the tenant under an agreement dated July 5, 1899, at the yearly rent of 250*l.* By that agreement the respondent agreed (*inter alia*) to pay all rates, taxes, and other charges except tithe rent-charge, land tax and landlord's property tax, and to keep the gates, fence-walls, culverts, drains and fences of every description in good repair and condition, and do all other works presentable and ordered from time to time to be done by the commissioners of sewers of the Caldicot Level (except the sea walls, bridges and gouts).

The farm was assessed to the poor rate at a gross estimated rental of 250*l.* (*viz.*, 225*l.* for agricultural land and 25*l.* for buildings), and at the rateable value of 197*l.* for agricultural land and 22*l.* for buildings, and the respondent was rated at these respective sums in the poor rate in question.

Subsequently to the making of the rate the respondent gave notice of objection to the assessment committee against his assessment, which on January 18, 1905, was altered as follows: The gross value was continued at 250*l.*, but the rateable value of the land was reduced from 197*l.* to 191*l.* and of the buildings from 22*l.* to 21*l.*

The respondent, being dissatisfied with this reduction, appealed to quarter sessions, upon the ground that, in arriving at the rateable value of the farm, not any or an insufficient deduction or allowance had been made in respect of the rent-charges payable in respect of the farm and other property within the level by the Provost and Fellows of Eton College, as owners of the farm and other property, to the commissioners of sewers of the level under the Caldicot and Wentlooge Level Act, 1884 (47 & 48 Vict. c. cxxxiii.).

The level was a district under the jurisdiction of the commissioners, and Moorbarn Farm was situated wholly within it. By virtue of the Caldicot and Wentlooge Level Act, Moorbarn Farm (together with the other property belonging to Eton

College, also within the level) was subject to the following rent-charges payable annually by the College as the owners of the farm and other property to the commissioners, viz., a rent-charge of 260*l.* payable in respect of the provision and maintenance by the commissioners of the sea walls in the level, and a rent-charge of 20*l.* 8*s.* 7*d.* payable in respect of the maintenance by the commissioners of the reens and drainage of the lands in the level. The rent-charge of 260*l.* was not charged upon any particular parts of the farm and other property belonging to Eton College, but upon the whole thereof, and might be recovered by distress upon any part of the farm and other property or by action against the Provost and Fellows of Eton College as the owners. A portion of the rent-charge of 20*l.* 8*s.* 7*d.*, namely, the sum of 16*l.* 4*s.* 7*d.*, was specifically charged upon part of the farm.

Moorbarn Farm, or the greater part of it, lay at a lower level than Hill Farm (which was the subject of rating referred to in *Newport Union v. Green*, the second of the two cases), and the whole of Moorbarn Farm would be liable to inundation if there were defects in the sea walls or in certain portions of the reens or in Fisher's Gout, all of which works were maintainable by the commissioners.

The rent-charges of 260*l.* and 20*l.* 8*s.* 7*d.* respectively were paid and borne wholly by the College as owners of the property, and no part was borne by the respondent, and the rent-charges were not, nor was any part thereof, expended specifically upon and in respect of the respondent's farm, but they were expended by the commissioners partly in maintaining the sea walls and the reens and drainage works throughout the level generally, and partly in repayment of loans created under the authority of s. 27 of the Caldicot and Wentlooge Level Act, 1884. During the ten years next preceding the passing of that Act the College, as owners of the lands before mentioned, expended 3826*l.* 8*s.* 1*d.* (being equivalent to an annual outlay of 382*l.* 12*s.* 9*d.*) upon the maintenance of sea walls and other defences upon their lands in order to protect them from inundation. Those defences were now maintained by the commissioners, and the College were relieved of all liability for the same.

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Only certain portions of the lands within the level were liable to the payment of rent-charges to the commissioners, the remaining portions of the lands within the level being exempt from all such rent-charges and from liability to contribute towards the cost of the works executed by the commissioners.

On the hearing of the appeal it was assumed, and accepted by the parties, that the fact that some of the lands within the level were exempt from rent-charges and liability, was (as is recognized by the Act of 1884) due to those lands having, prior to the passing of that Act, been disposed of by the then owners freed and discharged from and indemnified against all liability to pay or contribute towards the cost of making and repairing sea walls and other defences and works for the protection and drainage of the level. The lands within the level which were not subject to any such rent-charge or liability, and in respect of which no contribution was made towards the expenditure incurred by the commissioners in repairing and maintaining the sea walls and reens and drainage of the level, were benefited by the said expenditure and works equally with and to the same extent as other lands within the level which were subject to the rent-charges. The sea walls in the level which were repaired and maintained by the commissioners out of the said rent-charges extended from eighteen to twenty miles in length.

On behalf of the respondent, and in support of his appeal, it was contended that the amount of the rent-charges of 260*l.* and 20*l.* 8*s.* 7*d.* was an expense necessary to maintain the farm in a state to command the rent thereof within the meaning of the Parochial Assessment Act, 1836, and that consequently the respondent was entitled to have the amount of the rent-charges or a fair proportion thereof (having regard to the extent and annual value of the other property belonging to Eton College within the level, which was also subject to the same rent-charges) deducted from the rateable value of the farm.

On behalf of the appellants it was contended that the respondent was not entitled to have the amount of the rent-charges or any portion thereof deducted from the rateable value of the farm, inasmuch as (a) the rent-charges were a charge on landlords only and not on the tenant, and were not imposed and were not

applied for the benefit of the respondent's farm only, but were imposed and applied by the commissioners for the benefit of (inter alia) lands and other hereditaments in the level which did not belong to Eton College, and were not burdened with any such rent-charge and were payable irrespective of whether the farm needed protection or not, and might be applied in the execution of works miles away from the farm ; (b) that the rent-charges were not a charge imposed on all the properties in the level which were benefited by the works done by the commissioners, but were a charge imposed upon some properties only for the benefit not only of the properties burdened therewith, but also for the benefit of other properties which were not burdened at all ; and (c) that consequently the rent-charges were not, nor was any part thereof, a deduction authorized by the Parochial Assessment Act, 1836, nor an expense necessary to maintain the farm in a state to command the rent thereof within the meaning of that Act.

No evidence was given as to the portion of the rent-charges which it was contended by the respondent ought to be deducted from the rateable value of the farm, but it was agreed that if the respondent's contention was correct, the assessment of the rateable value of the whole of the farm (land and buildings) should be reduced to 71*l*.

The quarter sessions held that the respondent was entitled to have a portion of the rent-charges, namely, 141*l*., deducted from the rateable value of Moorbarn Farm, and they allowed the appeal to that extent.

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In this case the same question was raised as to the rating of Hill Farm, which is situate in the parish of Goldcliff, and is wholly within the level. The facts were substantially the same as in the other case, except that the buildings of the farm were free from floods, but the remainder of the land occupied by the respondent would be liable to inundation if there were defects in the sea walls which were maintained by the commissioners. The farm was not protected by many of the works maintained by the commissioners.

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A portion of the rent-charge of 20*l.* 8*s.* 7*d.*, viz., the sum of 1*l.* 8*s.*, was specifically charged upon part of Hill Farm. In this case the quarter sessions held that the respondent was entitled to have a portion of the rent-charges deducted from the rateable value of the farm, and they allowed the appeal.

The question for the opinion of the Court in each case was whether the quarter sessions came to a correct determination in point of law.

*Ryde*, for the appellants. The quarter sessions were wrong in allowing this deduction, the rent-charges not being an expense necessary to maintain those particular hereditaments in a state to command the rent. Those rent-charges are charged only upon the landlord, and are imposed for the general benefit of the whole of the lands within the level and not for the exclusive benefit of the farms in question; they cannot, therefore, be deducted: see *Rex v. Parrot* (1); *Reg. v. Vange*. (2) The case is different when the deduction sought applies specifically to the particular hereditaments: *Reg. v. Hall Dare* (3); *Reg. v. Gainsborough Union* (4); *Reg. v. Smith*. (5)

*Macmorran, K.C.*, and *S. R. C. Bosanquet*, for the respondents. The quarter sessions were right in allowing these deductions. The rent-charges, which are a commutation of immemorial liabilities, are imposed for the protection of the land charged. The fact that other properties get the benefit as well may be a ground for an apportionment, but it is not a ground for refusing to allow any deduction. In any view, therefore, some deduction ought to be allowed. The decision in *Reg. v. Vange* (2) cannot be supported in view of the later decisions cited.

LORD ALVERSTONE C.J. Upon the main question raised in this case as to the right to have either the whole of the rent-charges or an apportioned part deducted, I entertain no doubt. It seems to me that when the definition of rateable value in s. 1 of the Parochial Assessment Act, 1836, is considered, it is clear, quite

(1) (1794) 5 T. R. 593.

(3) (1864) 5 B. & S. 785.

(2) 3 Q. B. 242.

(4) (1871) L. R. 7 Q. B. 64.

(5) (1885) 55 L. J. (M.C.) 49.

apart from authority, that on the principles of rating the deduction claimed cannot be a proper deduction. The standard is the rent, the property being assumed to be reasonably let, free of all usual tenant's rates, deducting from the rent the proper annual cost of repairs, insurance and other expenses, if any, necessary to maintain the premises in a state to command such a rent. It seems to me, therefore, that any deduction which is made (and there seems a long series of authorities to support this view) must be a deduction in making which regard must be had to the particular hereditaments. The question is, Is the money sought to be deducted an expense, apart from the specific items of repairs and insurance, necessary to maintain the premises to command the rent? It cannot be disputed by the appellants that if this were the ordinary case of a tax paid to keep up the bank around this particular hereditament, or this and a number of other hereditaments, if there was a proper apportionment, it would be a proper deduction. That was expressly decided in regard to sewage or drainage rates in *Reg. v. Hall Dare* (1) and *Reg. v. Gainsborough Union*. (2) At first I thought that the appellants' contention was that because the rate was imposed upon the owner it was not a proper deduction, but when the authorities are looked at it seems clear—indeed, it was expressly pointed out in the two cases I have just cited—that the fact of its being charged upon the owners made no difference, assuming it to be an expense necessary to maintain the premises in a condition to command the rent.

It must be taken on the facts found by the quarter sessions that these rent-charges are paid in respect of expenses incurred for a number of other properties within the same area which are benefited by these banks. It is not suggested that it is a rateable proportion by acre over all the lands benefited. It must also be taken, and indeed it appears from the Act of 1884, that there are lands which are benefited and do not pay at all; therefore the state of things with regard to the actual amount of the rent-charge is anomalous. This arises from the fact that a large number of lands receiving benefit were by some operation in ancient times freed from the burden of payment, and that the

(1) 5 B. &amp; S. 785.

(2) L. R. 7 Q. B. 64.

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rent-charges had become specific chief rents commuting certain liabilities which existed at the time the Act of 1884 was passed. Under these circumstances it seems to me that when the particular rent is paid to meet an expense which benefits or protects other property it must, under s. 1 of the Parochial Assessment Act, 1836, be disallowed as a specific deduction; authorities which are binding on this Court make that clear. I agree that *Reg. v. Vange* (1) is from some points of view not altogether a satisfactory decision, but at any rate it is clearly binding upon us, when we consider how it has been regarded in subsequent decisions. In that case, there being an obligation upon the owner of a certain portion of Canvey Island to protect the banks of the whole of the island, it was held that in considering the question of rateable value he could not deduct the charge or cost of fulfilling his obligation in order to bring down the otherwise beneficial occupation to a non-beneficial occupation. The question of quantum did not arise. There are expressions in that case which have been criticized, because it appears that upon the true facts of the case another view might have been taken, but the case was considered in 1871 by Blackburn J. in *Reg. v. Gainsborough Union* (2), where the question was as to a drainage rate charge under a local Act properly apportioned, and Blackburn J. called it "an expense necessary to maintain the land in a state to command the rent," and none the less because it was arrived at by an acreage division, there being nothing to shew that that division was wrong. In that case *Reg. v. Vange* (1) was cited as an authority against the deduction being allowed, and Blackburn J. said that in that case the charge was a charge on land for the embankment of other lands, and not merely for the benefit of the land itself. Whether that is true or not, that was the test which Blackburn J., a great authority on this branch of the law, applied when considering whether a particular deduction ought to be allowed or not. Two very weighty authorities, Cave J. and Wills J., in *Reg. v. Smith* (3), drew exactly the same distinction. Cave J. said, referring to *Reg. v. Vange* (1), that there "the commissioners

(1) 3 Q. B. 242.

(2) L. R. 7 Q. B. 64.

(3) 55 L. J. (M.C.) 49.

were empowered to tax the occupiers of the land so held, in order to supply funds for the keeping up of the embankment; and the owners of the other land, which had not been granted in consideration of the embankment, were entitled to be protected from inundations at no expense to themselves. Therefore, in that case, the tax could not be deducted. It is quite true that these expenses are not expenses incurred by each landlord himself, but the appellant is compelled to contribute to them by the Act of Parliament." And then the learned judge cited and followed the case of *Reg. v. Gainsborough Union*. (1) Therefore in these two cases in which this question has been considered the construction has been put upon *Reg. v. Vange* (2) which supports the main proposition, namely, that the expense must be one which is necessary to maintain the particular hereditaments in a state to command the rent. I therefore think that the right to these particular deductions could not be properly claimed.

That would be sufficient to dispose of this appeal, but that which has happened in this case has happened in many others. In the course of the argument it appeared that sufficient consideration had perhaps not been given to what may be a very important point. I only indicate this in order that my judgment may not be misunderstood, but I think it does not follow that because the specific rent-charges cannot be deducted there ought to be no allowance under s. 1 of the Act of 1836 in respect of the expenses necessary to keep the premises in a state to command the rent. I do not overlook the contention of the respondent that it is as broad as it is long, because, as he said, there would be a higher rateable value in respect of the other property and a lower rateable value in respect of this. That does not seem to me of necessity to shew that the incidence of taxation is properly distributed. I think a question may arise as to whether or not, inasmuch as these lands are liable to incursions of the sea, and have to be protected by drainage works, the hypothetical tenant of all lands which are so subject may not be entitled to have a deduction in respect of that liability and responsibility which of course is quite independent of the particular amount of the stereotyped rent-charge which is the subject of the rent-charges under the Act

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of 1884. I agree that the case does not enable us to deal with that point, and in my opinion, as the case was fought on these materials, it ought not to be sent back to the sessions. In holding that these particular rent-charges are not the proper subject of deduction, anything I have said is without prejudice to any question which may be raised in a subsequent appeal as to whether or not the occupiers of land situated in such a position as to require protection may not be entitled to some deduction on the ground that the hypothetical tenant, who is the person to be considered, would have had to bear the expense of the protection of his own property. I think, therefore, that this appeal must be allowed on the ground that the particular deductions claimed were not authorized by law and that the quarter sessions ought not to have deducted them in arriving at the rateable value.

RIDLEY J. and DARLING J. concurred.

*Appeal allowed.*

Solicitors for appellants: *Frederick Kinch, for Lyndon Moore & Cooper, Newport, Monmouth.*

Solicitors for respondents: *Hallowes, Carter & Ellis.*

W. J. B

WEST RIDING OF YORKSHIRE COUNTY COUNCIL,  
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 RESPONDENTS.

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*County Rate—Appeal against Basis or Standard—Appeal against Rate—Parish aggrieved—“Cause of Appeal”—Time for Appeal—Retrospective Alteration of Basis—Jurisdiction—County Rate Act, 1852 (15 & 16 Vict. c. 81), ss. 17, 22.*

The appeal given by s. 22 of the County Rate Act, 1852, to a parish which is “aggrieved by any rate or assessment” made upon the county rate basis to “the next quarter sessions of the peace after such cause of appeal shall have arisen” must be brought to the next practicable quarter sessions after the parish is in fact aggrieved by the rate; the appeal is not to the next practicable quarter sessions to be held after the parish finds out that it is aggrieved.

A county rate which affected the parish of M. was made in October, 1904. In January, 1905, as the result of an appeal by a railway company against their assessment to the poor rate in the parish of M., the rateable value of the parish for the purpose of the county rate basis or standard was reduced by a considerable sum. On April 17, 1905, the parish council of M. gave notice of appeal to the next quarter sessions against such part of the basis or standard as affected that parish, and also against the rate existing upon that basis or standard, they alleging that they only knew of the result of the appeal by the railway company and its effect on the county rate basis on March 28:—

*Held*, that the parish council had not appealed against the county rate to the next quarter sessions after the “cause of appeal” had arisen within the meaning of s. 22 of the County Rate Act, 1852, and that, therefore, the quarter sessions had no jurisdiction to entertain the appeal against the rate.

On an appeal to quarter sessions under s. 17 of the County Rate Act, 1852, against the basis or standard of the county rate, the Court has no power to make an order that an alteration of the basis or standard shall have a retrospective effect.

CASE stated by quarter sessions for the West Riding of Yorkshire.

An appeal to quarter sessions was brought by the parish council of Middleton against such part of the basis or standard for the county rate of the West Riding of Yorkshire, prepared by the West Riding County Council, as affected that parish, and also against the rate or assessment upon the said basis or standard, for which a precept dated October 31, 1904, had been issued to

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the guardians of the union comprising Middleton parish. At the hearing the following facts were admitted or proved:—

County rates were made by the county council half-yearly in May and October, and on October 12, 1904, they made the rate appealed against, and a precept dated October 31, 1904, was thereupon issued to the guardians. This rate was made on the basis or standard as last revised in the then preceding July, and was payable on December 16, 1904. During the period covered by the precept and rate the total assessable value of the property in the parish for the county rate was by the existing basis or standard fixed at 13,419*l.* Included therein was a portion of the line of the Great Northern Railway Company, which in the valuation list of the parish and in the basis or standard of the county rate was of an assessable value of 3100*l.*; this assessment, as the county council knew when they made the revision, was under appeal by the railway company on the ground of over-assessment.

The Great Northern Railway Company had duly served notices of objection to their assessment in respect of the poor rates levied in October, 1903, May, 1904, and October, 1904, on the ground of over-assessment, and after certain negotiations the railway company gave notices of appeal to quarter sessions against the rates. These appeals, after being once respited, were determined by the quarter sessions in January, 1905, when the court reduced the net rateable value of the railway company's property in the parish from 3100*l.* to 1414*l.*; that reduction affected the poor rates levied in October, 1903, May and October, 1904, and involved the repayment by the guardians to the railway company of the excess rates paid by the latter for these three half-years. The rateable value of the parish for the purpose of the county rate basis or standard was, as the result of such appeals, reduced by the sum of 1686*l.* The parish council did not appear to take any part in that appeal. In May and December, 1904, the clerk to the assessment committee of the union comprising Middleton parish made a return to the county council which comprised the rateable and assessable values for poor rate purposes of Middleton parish; the figures in the return included the net rateable value of the railway company's property in the parish at 3100*l.*

Between January and March, 1905, correspondence took place between the guardians of the union comprising Middleton parish and the county rate committee as to a correction of the county rate basis or standard in view of the result of the appeal of the Great Northern Railway Company, the guardians claiming to have the basis reduced and the excess rates which had been paid returned to them. No communication, however, passed during this period between the parish council and the county rate committee.

On March 10, 1905, the overseers of Middleton parish served upon the county council notice of appeal against such part of the county rate basis as affected the parish, and against the county rate of October 12, 1904, made thereon; but on March 28, 1905, that appeal was withdrawn, as, by virtue of s. 6 of the Local Government Act, 1894, the notice of appeal ought to have been given by the parish council, who, for this purpose, are substituted for the overseers.

On April 17, 1905, the parish council, in pursuance of a resolution dated March 28, 1905, served upon the county council notice of their intention to appeal at the next quarter sessions against such part of the basis or standard as affected Middleton parish, and also against the rate existing upon that basis or standard.

On April 27, 1905, notice was sent to the parish council that the county rate committee had decided to alter the county rate basis for Middleton parish from 13,419*l.* to 11,713*l.*, and in further correspondence which passed between the parish council and the county rate committee the latter intimated their willingness to consent to an order at the quarter sessions shewing this reduction in the basis, but they stated that they would insist upon payment of all outstanding rates on the basis as it existed prior to the alteration.

At the hearing of the appeal on June 26, 1905, counsel for the county council objected that the quarter sessions had no jurisdiction to hear the appeal against the rate, inasmuch as the parish council had not appealed to the next quarter sessions after the cause of appeal had arisen, as required by s. 22 of the County Rate Act, 1852. Counsel for the parish council called as a

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witness the clerk of the parish council, who swore that the result of the appeal of the Great Northern Railway Company and its effect on the county rate basis was not known to the parish council until March 28, 1905, and it was contended that under the circumstances the appeal had been brought to the proper court of quarter sessions, and that the county council had consented to the jurisdiction of the court. The quarter sessions overruled the objection, holding that in the circumstances the appeal was in fact made to the proper court of quarter sessions.

The appeal both as to the basis and the rate was then proceeded with, and counsel for the parish council asked that the appeal as to the basis should be allowed and an order made altering the basis from 14,232*l.* (assessable value 13,419*l.*) to 12,453*l.* (assessable value 11,713*l.*), and that such order should cover the period covered by the precept of October 31, 1904. He further asked for an order reducing the rate appealed against to a figure proportioned to the amount of the basis altered as aforesaid.

Counsel for the county council called no evidence, but contended—(1.) that the quarter sessions had no power to allow the appeal against the basis, the figures of which were admitted to be correct at the time of the hearing of the appeal; (2.) that assuming, without admitting, that the court had such power, the court had no power to order a retrospective alteration of the basis from a date antecedent to the appeal and the notice of appeal; and (3.) that the appeal should be dismissed.

The quarter sessions ordered that the appeal in respect of the basis be allowed, and that the basis be reduced from 14,232*l.* (assessable value 13,419*l.*) to 12,453*l.* (assessable value 11,713*l.*), such reduction to take effect as covering the period covered by the precept of October 31, 1904. No other order was made on the appeal except as to costs.

The questions for the opinion of the Court were—(1.) whether the quarter sessions were right in holding that in fact the appeal was brought to the proper court of quarter sessions; and (2.) whether the quarter sessions had power to order a retrospective alteration of the basis from a date antecedent to the hearing of the appeal and the notice of appeal.

*Ryde* (*Scholefield* with him), for the county council. The quarter sessions acted without jurisdiction. They endeavoured to evade the express provisions of the County Rate Act, 1852, by refraining from an alteration of the rate, but nevertheless altering the basis or standard and making that alteration retrospective. The appeal against the basis or standard is given by s. 17 of the County Rate Act, 1852 (1), which does not justify the making of the alteration retrospective. Sect. 23 of the Act supports this view, for it provides that where the quarter sessions lower the rate, any excess which has been paid is to be returned; but there is no corresponding section as to the basis. The appeal against the rate is governed by s. 22 (2),

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(1) Sect. 17 of the County Rate Act, 1852 (15 & 16 Vict. c. 81), allows an appeal against the basis or standard for the county rate to any quarter sessions to be holden after the sessions at which such basis or standard has been allowed and confirmed, and it empowers quarter sessions "to hear and determine such appeal . . . and either to confirm such parts of the basis or standard as have been appealed against, or to correct such inequalities or omissions as shall be proved to exist therein, in such manner as to them the said justices may appear fair, just and equitable . . ."

(2) Sect. 22 provides: "If the churchwarden or churchwardens, overseer or overseers of the poor [now the parish council; see s. 6 of the Local Government Act, 1894], . . . shall at any time thereafter have reason to think that such parish, township, or place is aggrieved by any rate or assessment now existing, or hereafter to be made upon the basis or standard hereinbefore mentioned . . . whether it be on account of the proportions assessed upon the respective parishes, townships, or places being unequal, or on

account of some one or more of them being without sufficient cause omitted altogether from the rate, or on account of such parish, township, or place being rated at a higher proportion of the pound sterling according to the fair annual value of the rateable property therein, or on account of some other parish or parishes . . . being rated at a lower proportion of the pound sterling according to the fair annual value of the rateable property therein than has been fixed and declared . . . as the basis of the rate of the said county, or on account of the altered state of the value of the property assessed, or any part thereof, or shall have any other just cause of complaint whatsoever, it shall be lawful for such [parish council] . . . to appeal to the justices of the peace for the county at the next quarter sessions of the peace after such cause of appeal shall have arisen, against such part of the rate only as may affect the parish or parishes . . . which are unequally rated, or which shall appear to be over-rated or under-rated, or omitted altogether from the rate: Provided always, that fourteen clear days'

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and is expressly limited to the next quarter sessions after the cause of appeal has arisen; in the present case that would be the next quarter sessions from the making of the rate in October. Even if the cause of appeal only arose after the decision of the Great Northern Railway appeal in January, the parish council should have appealed to the Lady-day quarter sessions at the latest; in any view, therefore, the appeal was out of time.

*Scott Fox, K.C. (R. A. Shepherd with him),* for the parish council. The quarter sessions were right on both points. First, the appeal against the rate was brought in proper time. By s. 22 of the County Rate Act, 1852, the appeal is to be brought to the next quarter sessions after the "cause of appeal" has arisen; this means the next quarter sessions after the party complaining has reason to think that the rate is unequal. Here there was no grievance, and therefore no "cause of appeal" till after the decision of the appeal of the railway company. Further, the parish council did not in fact know of the decision in that appeal and its effect on the county rate basis till March 28, and until that date they had no reason to think that they were aggrieved. If the contention of the county council were right s. 22 should have said in terms that the appeal lay to the next quarter sessions to be held after the rate was made, and, in the absence of express words, such a construction should not be put upon that section. Secondly, the quarter sessions were entitled under s. 17, for the purpose of correcting the inequality shewn to exist, to make the order as to the alteration of the basis or standard retrospective, as that was in the circumstances "fair, just, and equitable."

notice in writing previous to the first day of such last-mentioned quarter sessions shall be given by the parties intending to appeal . . . ; and the said justices are hereby empowered to hear and finally determine the same, and either to confirm such parts of the rate as have been appealed against, or to correct such inequalities, disproportions, or omis-

sions as shall be proved to exist therein, as well in respect of the basis or standard as in the assessment of the rate made thereon, in such manner as to them the said justices shall appear fair, just, and equitable, anything in this Act, or any former Act or Acts, or any law, usage or custom, to the contrary thereof notwithstanding . . . ."

RIDLEY J. There are two points raised in this case, the first being whether the appeal was brought to the proper court of quarter sessions—a point as to time—and the second whether, if there was power to allow the appeal at all, the quarter sessions could order a retrospective alteration of the basis from a date antecedent to the hearing of the appeal, so as to alter the rate.

The case is one of some little complication until one thoroughly appreciates the dates of the various proceedings. It appears that in the parish of Middleton the county rate basis had been fixed as from July, 1904. In September of that year a notice of appeal was given by the Great Northern Railway Company against the poor rate. On October 12 a county rate was made on the parish of Middleton on the county rate basis, and on October 31 a precept was issued to the guardians. In January, 1905, the appeal of the railway company against the poor rate came on for hearing. It was an appeal not only against the poor rate of October, 1904, but against the two previous half-yearly poor rates, and it was successful, the company's assessment being reduced by 1686*l*. In the meantime the parish of Middleton had done nothing, but on March 10, 1905, the overseers served on the county council a notice of appeal against such part of the county rate basis as affected the parish, and against the county rate of October 12, 1904, which, as I have mentioned, had been made upon the old county rate basis. That notice was given in error, for the proper appellants were the parish council, but the mistake was rectified on April 17, when a notice was served by the parish council on the county council of their intention to appeal to the next quarter sessions against the county rate basis for the parish of Middleton, and also against the rate which existed on that basis. That appeal to quarter sessions is the subject of the present appeal to this Court.

The quarter sessions allowed the appeal in respect of the county rate basis, and as to that I do not think that any question of substance arises here, for during the interval between the making of the rate and the hearing of the appeal the county council had resolved to reduce the county rate basis to the assessable value of 11,713*l*., thus practically conceding the figure aimed at by the parish council this was, of course, the real result

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of the appeal of the railway company. The quarter sessions then went on to say that the reduction was to date back and take effect as from the commencement of the half-year covered by the precept of October 31, 1904. In my opinion, although the parish council were clearly entitled to have the figures of the county rate basis altered in accordance with what is now admitted to be the proper figure, they had no right to insist upon what was in fact the alteration of the rate.

The appeal was a double one—against the county rate basis and against the rate. In order to ascertain whether the appeal against the rate was brought to the proper quarter sessions we have to look at the provisions of the County Rate Act, 1852. Sect. 17 of that Act relates to appeals against the basis, and it gives the overseers—now the parish council—who have reason to think that the parish is aggrieved by the basis or standard, a right to “appeal to the justices of the peace for the county at any quarter sessions to be holden after the sessions at which such basis or standard was allowed and confirmed,” and it gives the quarter sessions the right and power “to hear and determine such appeal . . . and either to confirm such parts of the basis or standard as have been appealed against, or to correct such inequalities or omissions as shall be proved to exist therein, in such manner as to them the said justices may appear fair, just, and equitable.” It is obvious that under the scheme of the Act the county rate basis was intended to exist for such period as by reference to the earlier sections seemed desirable, until some cause arose for its alteration. It was to be, as far as possible, a permanent basis; it was to be the unit or foundation of each rate that might have to be levied. Nothing is said in s. 17 about the power of quarter sessions, when deciding appeals against the basis, to alter any rate which has been made upon that basis. The Act is silent on the subject. Therefore, *prima facie* the quarter sessions have no power to deal with the rates which have been made before the time at which the appeal against the county rate basis comes before them. But it is also clear that the scheme of the Act would not have been complete without also allowing for appeals against the rates which might be made on that basis, and that is dealt with by s. 22,

which gives the parish the right to appeal against the particular rate. The right is given to the parish council (originally to the overseers) which has "reason to think that such parish . . . is aggrieved by any rate or assessment now existing," the appeal being "to the justices of the peace for the county at the next quarter sessions of the peace after such cause of appeal shall have arisen."

It has been argued for the respondents that the right of appeal dates from the time when the parish council has reason to think that they are aggrieved, and that the "next quarter sessions of the peace after such cause of appeal shall have arisen" means the next quarter sessions after they have found out that they are aggrieved. I am not prepared to accept that construction of the section, which I think gives too much emphasis to the words "have reason to think." I do not think it is from the time when they have reason to think that the date must be calculated; it is from the time when they are in fact aggrieved. The words "have reason to think" have no more emphasis upon them than has the word "aggrieved" in s. 4 of the Poor Relief Act, 1743. The words, in my view, are merely a phrase to introduce the paragraph by which the real object is effected, namely, the power to appeal to the next quarter sessions after there has been an unjust rate made. That reading, as my brother Darling has pointed out, finds some corroboration in the fact that s. 22, after setting out the various reasons for being aggrieved, proceeds thus, "or shall have any other just cause of complaint whatsoever." Such an appeal unquestionably dates from the cause of complaint, and not from the time when the persons have found it out. Under these circumstances I am of opinion that as to the appeal against the county rate, as distinguished from that against the county rate basis, the notice of appeal must be given to the next practicable quarter sessions, that is, the next quarter sessions for which a fourteen days' notice can be given. In the present instance the fact is that in October, 1904, when the rate was made against which the appeal was brought, there was not the same reason why the parish council should come to the conclusion that they were aggrieved by that rate because it had not then been decided by the quarter sessions that the Great Northern

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Railway Company had been over-assessed. The parish council had in point of fact a grievance—a right to say “We appeal”; but it was subject to this, that they would have to prove that there was an over-assessment on their parish; whereas in January, 1905, they were actually in a better position in view of the success of the railway company’s appeal. In my opinion, therefore, the parish council ought to have appealed to the January sessions in order to satisfy the words “the next quarter sessions after such cause of appeal shall have arisen.” But in any view there was a “cause of appeal” in January, when the assessment had been reduced. There was then ample time to appeal to the March quarter sessions, and it is no answer to say “We did not in fact know it, and the reason is that we are only by accident the persons who ought to appeal, because of the Local Government Act, 1894.” They cannot be heard to say that they have been put in the place of those who previously would have conducted the appeal on behalf of the parish. Assuming the March sessions to be the “next practicable quarter sessions,” the overseers no doubt gave notice of appeal to that sessions, but their notice was of course wholly ineffective, and their action does not help the parish council. The parish council, therefore, had not the right to claim to have the rate altered. The quarter sessions have not, indeed, altered the rate in so many words, but they have said, “We will make an order that our alteration of the basis, which is perfectly right as far as it goes, shall be dated back to the time which is covered by the precept of October 31, 1904.” By so doing they do alter the rate; in effect they alter a rate which they have no power to alter, and their order, in my opinion, cannot be maintained. If it had been intended that in dealing with the county rate basis the quarter sessions should have power to alter the rates which had been made upon it or to say that rates which had been paid should be returned, I think that specific provision would have been made to that effect in s. 23, which contains various provisions as to how other rates which have been levied or received are to be dealt with. In dealing with an appeal against rates such provisions are inserted; in dealing with appeals against the county rate basis they are absent. The decision of the quarter sessions that their order as

to the basis is to have relation back to the period covered by the precept of October 31, 1904, cannot be supported.

DARLING J. I am of the same opinion.

*Appeal allowed.*

Solicitors for county council: *Clements, Williams & Co., for Trevor Edwards, Wakefield.*

Solicitors for parish council: *Pitman & Sons, for Emsley, Son & Smith, Leeds.*

W. J. B.

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### AUSTIN v. NEWHAM.

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May 7.

*Landlord and Tenant—Agreement of Tenancy—Construction of.*

A tenant entered into possession of premises under an agreement of tenancy "for a period of twelve months with the option of a lease after the aforesaid time at the rental of 30*l.* per annum":—

*Held*, that under that agreement the tenant had a right to claim a lease for a further period of at least one year after the expiry of the first twelve months.

*Semble*, per Kennedy J., he had a right to claim a lease for his life.

APPEAL from the Norwich Guildhall Court of Record.

On May 9, 1904, the plaintiff Mrs. Austin, then Elizabeth Coe, entered into the following agreement with the defendant:—

"I Elizabeth Coe agree to let to Alfred John Newham the shop and dwelling-house situated at No. 1A, Swansea Road, Norwich, for a period of twelve months with the option of a lease after the aforesaid time at the rental of thirty pounds per annum." The defendant upon the same date entered into possession of the premises under the agreement. Some time before the expiry of the twelve months therein named the plaintiff formally demanded possession to be given up on May 9, 1905, but the defendant refused and claimed to exercise the "option" given by the agreement, whatever that option might be held to be, and he remained in possession after May 9, 1905. In October, 1905, the plaintiff brought ejectment. The judge held that upon the option being exercised by the defendant a further tenancy was created



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for one year from May 9, 1905, and, that year being still unexpired, he gave judgment for the defendant. The plaintiff appealed.

*R. V. Bankes*, for the plaintiff. As no term was specified in the agreement for which the option might be exercised the clause giving the option must be treated as void. No action could possibly be maintained for specific performance of such an agreement. In *Fitzmaurice v. Bayley* (1) Hill J., in giving his opinion to the House of Lords, said: "It is clear that an agreement for a lease not specifying a definite term cannot be enforced." Here the judge relied upon the *Bishop of Bath's Case* (2), where it was held that "if a man leases his land for years, it is a good lease for two years, because it shall be taken good for such a number with which at least the plural number will be satisfied, and that is with two years." But there the word "years" did indicate a period of time. Here there is no corresponding word.

[A. T. LAWRENCE J. How do you explain the use of the words "at the rental of 30*l.* per annum"?]

That has no reference to the period of the tenancy, but only to the rate of the payment. The words are equally applicable to a period of less than a year. They do not point to a tenancy for a year. The option is to take a "lease," which is something different from a tenancy for a year, which the defendant had already got.

*W. H. Stevenson*, for the defendant. The period for which the option was to be exercised was sufficiently defined by the agreement. The words "per annum" point to the minimum period on which the parties had agreed, namely, one year after the expiry of the first twelve months. There is no sense in those words if they are interpreted as meaning something less than that, as was said in the *Bishop of Bath's Case* (2) with reference to the word "years." That case is on all fours with the present. The agreement here provides, not that the rent is to be "at the rate of 30*l.* per annum," but that the lease is to be "at the rental of 30*l.* per annum," language which shews the intention to have

(1) (1860) 9 H. L. C. 78.

(2) 6 Rep. 34*b.*

been that the rent was to be paid in one lump sum at the end of the year.

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Secondly, even if the agreement was not sufficiently definite to entitle the defendant to have it specifically performed, still, as he was in possession and had agreed to pay rent, he was entitled to be treated as being in on the terms of a tenancy from year to year. It is well established that where a person who has been let into possession under an agreement for a future lease pays or agrees to pay any part of the annual rent thereby reserved he becomes a tenant from year to year: Woodfall's Landlord and Tenant, 17th ed. p. 244. In *Kusel v. Watson* (1), where the agreement provided that the plaintiff should have an underlease "at any period he may feel disposed," and he entered into possession of the premises under that agreement, it was held that he was entitled to an underlease for the residue of the lessee's term less one day, if he (the plaintiff) should so long live. That case is an authority that the defendant here is entitled to a lease for a further period of at least one year, and that is all that he asks for. The case of *Fitzmaurice v. Bayley* (2) is not in point. There the question was whether an agreement "to let the premises for the same rent and subject to the same conditions that I hold them myself," as it did not state the duration of the term, was a sufficient memorandum to satisfy the Statute of Frauds. It was held that it was not. But here the question of the Statute of Frauds does not arise, as there has been part performance, the defendant having entered into possession under the agreement.

*R. V. Bankes* in reply.

KENNEDY J. This case is not altogether free from difficulty, but I am not prepared to say that the judge was wrong in the construction that he put upon the agreement. The defendant by the terms of that agreement was to have "the option of a lease" after the expiry of the first twelve months at a certain rental. The judge held that that entitled him to a lease for a further period of one year and no more. As the defendant does not ask for more it is unnecessary to decide whether that term was

(1) (1879) 11 Ch. D. 129.

(2) 9 H. L. C. 78.

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sufficient. Having regard, however, to the case of *Kusel v. Watson* (1), I am inclined to think that the option of "a lease" entitled him to claim a lease for life. Bramwell L.J. there said: "The agreement provides that the tenant may come at any future time and apply for a lease. What kind of lease? The proper legal meaning of the term is a lease for the life of the tenant, and I think that the meaning the law puts on the words is a reasonable one." It is true that in that case there was a special provision that the plaintiff's lessor should not disturb him or raise his rent after he had laid out money in improving the premises, which pointed to an intention that the plaintiff's tenancy should be of considerable duration. But I do not think that Bramwell L.J.'s statement of the law was affected by that consideration. I am inclined to think that in the present case the defendant might have claimed a lease for as long a period as he is capable of holding it. In any case he is entitled to a year at least after the twelve months had expired. It would be altogether unreasonable to suppose that it was intended that he should be liable to be turned out at the end of the first twelve months.

The case of *Fitzmaurice v. Bayley* (2), relied upon by Mr. Bankes, is not in point. What was there decided was not that there was not a sufficiently definite agreement as to the duration of the term to have entitled the defendant to remain in possession if he had already entered, but that it was not sufficiently defined in writing to satisfy the Statute of Frauds and to entitle the plaintiff to enforce it against the defendant, who had not entered into possession. I say nothing with respect to Mr. Stevenson's other contention upon the effect of the defendant's entry.

A. T. LAWRENCE J. I am of the same opinion. Here there was an agreement to let certain premises for twelve months certain "with the option of a lease after the aforesaid time at the rental of 30*l.* per annum." It may be that what the parties contemplated was that during the twelve months they would come to an agreement as to the period for which the lease was to be granted. But whether that is so or not, I think it is an unreasonable construction of the agreement to suppose that the

(1) 11 Ch. D. 129.

(2) 9 H. L. C. 78.

tenant meant to leave it in the power of his lessor to turn him out on the last day of the twelve months. They must have contemplated some further period after the twelve months had expired. The question is, What period? The words "per annum" suggest that what was contemplated was at least one further year. This construction is in accordance with the *Bishop of Bath's Case* (1), where it was held that a lease "for years" was a good lease for two years, that being the shortest period that would satisfy the plural number.

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*Judgment for the defendant.*

Solicitor for the plaintiff: *Martelli, for Leathes Prior & Son, Norwich.*

Solicitor for the defendant: *W. E. Keefe, Norwich.*

J. F. C.

GARDNER, LOCKET & HINTON, LIMITED, APPELLANTS;  
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BUCK, APPELLANT; SMITH, RESPONDENT.

KEEN AND ANOTHER, APPELLANTS; ADAMS, RESPONDENT.

*River—Thames Navigation—Thames Conservancy By-laws, 1898—By-law 27*  
—*Navigation of Barges*—"One competent Man"—"One Man in Addition"  
—*Ultra Vires—Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.),*  
s. 191—*Licensed Lightermen—Hauling Barges out of Dock*—"Navigated"  
—*Watermen's and Lightermen's Amendment Act, 1859 (22 & 23 Vict.*  
c. cxxxiii.), s. 66.

By-law 27 of the Thames Conservancy By-laws, 1898, made under the powers conferred by s. 191 of the Thames Conservancy Act, 1894, provides that: "Any lighter navigating the river shall when under way have at least one competent man constantly on board for the navigation and management thereof, and all such craft exceeding 50 tons, but of not more than 150 tons, burthen shall when under way have one man in addition on board to assist in the navigation and management of the same":—

*Held*, that the by-law was not ultra vires, and that both men required by the by-law must be lightermen or watermen licensed by the Watermen's Company, or apprentices duly qualified.

*Perkins v. Gingell*, (1885) 2 Times L. R. 39; and *Goldsmith v. Slattery*, (1890) 63 L. T. 273, followed.



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Three lighters lashed together were hauled out of dock into the river by means of a line attached to one of them, and controlled by a man on the dock pierhead. On getting clear of the dock the line was slackened, and the lighters were carried up by the tide as far as the line would allow. A man on board then by means of a staff or hitcher pushed the lighters along the shore till they reached a spot ninety-five yards from the dock, where they were made fast:—

*Held*, that the lighters had not been “navigated” within the meaning of s. 66 of the Watermen’s and Lightermen’s Amendment Act, 1859.

A lighter, with a licensed lighterman on board, was drawn out of dock by means of hydraulic machinery fixed at the pierhead. On gaining the river the lighterman cast anchor, but it failed to hold, and, by the combined force of the hydraulic machinery, the wind, and the tide, the lighter was taken up the river for over 500 yards. The lighterman then secured the lighter at some barge roads:—

*Held*, that the lighter was not “navigating” the river within the meaning of by-law 27.

*Rolls v. Newell*, (1890) 25 Q. B. D. 335, followed.

THREE cases stated by metropolitan magistrates.

GARDNER, LOCKET & HINTON, LIMITED *v.* DOE.

An information was laid by the respondent against the appellants for that the appellants on the river Thames off the Regent’s Canal Dock, being the owners of a lighter, did unlawfully navigate the same without having a licensed lighterman in charge of such craft for the navigation and management thereof, in contravention of s. 66 of the Watermen’s and Lightermen’s Amendment Act, 1859. (1)

On the hearing of the information the following facts were proved:—

On June 2, 1905, three lighters the property of the appellants were lying in the Regent’s Canal Dock. For the purpose

(1) Watermen’s and Lightermen’s Amendment Act, 1859 (22 & 23 Vict. c. cxxxiii.), s. 66: “No barge, lighter, boat or other like craft for the carrying of goods, wares, or merchandise shall be worked or navigated within the limits of this Act, unless there be in charge of such craft a lighterman licensed in manner hereinbefore mentioned, or an apprentice qualified as hereinbefore mentioned; and if any such

craft be navigated in contravention of this section, the owner thereof shall in respect of such offence incur a penalty not exceeding five pounds, subject to this proviso, that no such penalty shall be payable if the owner proves to the satisfaction of the magistrate or Court before whom the case is heard, that he is unable, for the usual compensation, to obtain the services of any such lighterman or apprentice.”

of being taken out of the dock the lighters were lashed together with ropes, two of them being abreast, and the third astern of the two. A line was attached to the quarter ring or dolly of the third or sternmost lighter, and in this order and by this means the three were hauled through the lock of the dock and out into the river by the appellants' watchman, named Dolby, who stood with the line in his hand on the upper pierhead of the dock entrance.

When the lighters were clear of the upper pierhead the watchman placed his end of the line round a post or bollard on the upper pierhead, and by gradually slackening the line round the bollard allowed the three lighters, still lashed together, to be carried up by the tide, then about half flood, as far as the line, which was sixty feet long, would allow. Whilst this was happening another of the appellants' watchmen, King, who was on board one of the lighters, used a staff or hitcher to push the lighters along the shore. The line was then released from the quarter ring or dolly of the sternmost lighter. King then continued, by means of the staff or hitcher, to push the lighters along the shore until the foremost lighters reached a barge that was moored alongside the Old Sun Wharf, a distance of over ninety-five yards from the post on the pierhead round which the line had been placed, whereupon the lighters were made fast to the barge and left to await the arrival of the appellant's tug and three licensed lightermen to tow and navigate them to their destination at the Surrey Commercial Docks.

There was no licensed lighterman or apprentice in charge of the lighters.

Both the aforesaid pierhead and the Old Sun Wharf are within the limits of the Watermen's and Lightermen's Amendment Act, 1859.

By-law 61 of the Watermen's Company, made under the powers conferred by s. 80 of the Act of 1859, provides: "That it shall be lawful . . . for any person or persons being the owner of craft when such craft are alongside of and going into or out of any dock adjoining the river, to remove or cause them to be so removed by means of boat hooks or lines (but not by oars) by any person although not a freeman of the company licensed as

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aforesaid, without being subject to any penalty contained in the said Act or by-laws, nor shall any person so employed in removing such craft as aforesaid be subject to any such penalty."

It was contended on behalf of the respondent that the slackening away of the appellants' lighters from the pierhead to the place where they were moored and pushing them along the shore with a hitcher was a working and navigating within s. 66, and that, there not being a licensed lighterman in charge of each lighter, the offence charged had been committed.

It was contended on behalf of the appellants that the lighters were not worked and navigated within the true meaning and intent of s. 66; and that, even if they were so worked and navigated, they were exempt by reason of by-law 61.

The magistrate held that the lighters were worked and navigated within the meaning of s. 66; that by-law 61 was ultra vires, as it constituted the partial repeal of a section of an Act of Parliament; that even if the by-law was good it did not apply to the facts in question, as the lighters were not alongside the dock during the whole of the time they were worked and navigated, and so did not exempt the appellants from the operation of s. 66. The magistrate accordingly convicted the appellants.

The question for the opinion of the Court was whether his decisions on the above three points were right.

#### BUCK v. SMITH.

An information was laid by the respondent against the appellant whereby the appellant was charged for that he, being the owner of a barge or lighter called *Albert*, which on October 11, 1904, at the West India Docks was navigating the river Thames, and was then under way, and which then exceeded fifty tons burthen, did unlawfully cause the *Albert* to be so navigated without having one competent man constantly on board for the navigation and management thereof and one man in addition to assist in the navigation and management thereof, contrary to by-law 27 of the Thames Conservancy By-laws, 1898.

The following facts were proved:—The lighter *Albert* was over

fifty tons burthen, and the appellant was on October 11, 1904, the owner thereof. The lighter was then navigated on the river Thames near the West India Docks in charge of one Styles, who was then a lighterman's apprentice duly qualified and holding a licence enabling him to take charge of craft within the meaning of s. 66 of the Watermen's and Lightermen's Amendment Act, 1859. Styles was assisted by one Dale, who was not a licensed lighterman or waterman or an apprentice licensed to take charge of craft.

On behalf of the appellant Dale was tendered as a witness, and other evidence was also tendered, to prove that he was physically capable and an experienced person in the management and control of lighters, but the magistrate refused to receive any evidence, on the ground that such evidence was immaterial in view of the decisions in *Perkins v. Gingell* (1) and *Goldsmith v. Slattery*. (2)

By-law 27 of the Thames Conservancy By-laws, 1898, made under s. 191 of the Thames Conservancy Act, 1894, provides that: "Any lighter navigating the river shall when under way have at least one competent man constantly on board for the navigation and management thereof, and all such craft exceeding 50 tons, but of not more than 150 tons, burthen shall when under way have one man in addition . . . on board to assist in the navigation and management of the same, with the following exceptions: When being moved to and fro between any vessels or places a distance not exceeding 200 yards."

By-law 35 of the by-laws made in 1860 under s. 80 of the Lightermen's and Watermen's Amendment Act, 1859, provides that: "In all cases in which it may be necessary or requisite under such Act, or these by-laws or under the by-laws of the Conservators of the River Thames . . . that two able and skilful persons shall be employed . . . in vessels of more than 50 tons burthen navigated on the river, one waterman or lighterman licensed in manner provided by such Act and by-laws, or an apprentice licensed to take sole charge of craft, and an apprentice actually bound in manner provided by such Act, but not a person entered on liking for the purpose of being bound,

(1) 2 Times L. R. 39.

(2) 63 L. T. 273.

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shall be deemed and taken to be able and skilful persons within the meaning of such Act and by-laws respectively."

It was contended on behalf of the appellant that by-law 35 was ultra vires and bad as being in excess of the provisions of the Act of 1859, and in particular of s. 66; that there had been no breach of s. 66 or of by-law 27 of the Conservancy By-laws; that the appellant had discharged the duty imposed upon him by s. 66 by putting a licensed lighterman or qualified apprentice in charge of the lighter, and that so long as Dale was a person physically capable and an experienced person in the management and control of lighters he was a sufficient compliance with by-law 27, as the additional man therein mentioned need not be licensed to take charge or be otherwise qualified; that by-law 35 of the Watermen's Company did not create any offence at all or impose any duty upon the appellant for breach of which an information could be laid; that if by-law 35 did create an offence or impose any duty on the appellant so as to extend the operation of s. 66 the by-law was bad.

It was contended on behalf of the respondent that the second man required by by-law 27 must possess a legal qualification under the Act of 1859.

The magistrate convicted the appellant.

The question for the opinion of the Court was whether he was right in law in refusing to admit the said evidence.

#### KEEN v. ADAMS.

The appellants were summoned for that on October 5, 1905, on the river Thames off the Millwall Dock, they being the owners of the lighter *Triune*, which was then under way and which exceeded fifty tons burthen, did navigate the same without having on board one man in addition to the competent man constantly on board to assist in the navigation and management thereof contrary to by-law 27 of the Thames Conservancy By-laws, 1898.

The facts were as follows:—

On October 5 the appellants were the owners of the *Triune*, which exceeded fifty tons burthen. Prior to that day they had given directions that the lighter should leave the Millwall Dock on that day, and should anchor as near as convenient outside

in the river to await a tug that had been ordered to tow the lighter.

Alford, a licensed lighterman, was accordingly put in sole charge of the lighter. There was no man in addition on board. The lighter, with about twenty other lighters, was then drawn from the dock and through the entrance by hydraulic machinery which was fixed at the pier-head, and by that means gained the river. The respondent, a licensed lighterman, offered his services to Alford when coming out of the dock, but they were refused. The tug not having arrived, Alford cast anchor, but it failed to hold, the effect being that, by the combined force of the hydraulic machinery, the wind and the tide, the lighter was taken up the river towards the north side a distance of over 500 yards. Alford then succeeded in securing the lighter at some barge roads, the anchor dragging the whole time until that point was reached.

There was no want of skill on the part of Alford when he failed to anchor, nor was the failure due to any defect in the anchor or gear, but, if it had not been for the attempt to anchor which was made before the hydraulic force had been spent, the lighter would have been taken across the river from the dock to the south side.

The magistrate convicted the appellants.

The questions for the opinion of the Court were—(1.) was by-law 27 valid; (2.) was the lighter navigating the river.

*Scrutton, K.C.*, and *Cranston*, for the appellants in *Gardner, Locket & Hinton, Ltd. v. Doe* and *Keen v. Adams*; *Scrutton, K.C.*, and *H. Nield*, for the appellant in *Buck v. Smith*. The first question to be argued is that raised in the second and third cases as to the validity and effect of by-law 27 of the Thames Conservancy By-laws, 1898. First, the by-law is ultra vires. It purports to have been made under the powers conferred by s. 191 of the Thames Conservancy Act, 1894, but that section, while conferring power to make by-laws for the regulation of the navigation of the Thames, does not authorize a by-law saying how many men shall be employed on a particular craft. The by-law in so far as it requires the employment of two men on

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barges over fifty tons is inconsistent with and repugnant to s. 66 of the Watermen's and Lightermen's Amendment Act, 1859, which only requires one man. Secondly, as to the meaning of by-law 27. It is contended by the other side that the "competent man" and the "one man in addition" must be lightermen duly licensed by the Watermen's Company. The by-law does not say so, and its history is opposed to that construction. The by-law was originally made in 1860, and it then provided for the employment of "at least one able and skilful person authorized by the Watermen's Company"; but, as the Watermen's Company did not license for the whole area of the Thames Conservancy, in 1872, by a new by-law, No. 16, "one competent man," and in the case of barges over fifty tons, "one man in addition" to assist, were substituted for the "able and skilful person authorized by the Watermen's Company." By-law 27 of 1898 is substantially the same as by-law 16 of 1872. Therefore, taking the by-law by itself, the true construction is that the men, though they must be competent, need not be licensed. But it is said that the effect of by-law 35 of the Watermen's By-laws, 1860, is to make it plain that the men required by by-law 27 must be licensed watermen. By-law 35 only says that, where two able and skilful persons are required, one licensed waterman and one qualified apprentice "shall be deemed and taken to be" able and skilful persons. The by-law does not say that they are the only persons who may be employed, and by-law 27 does not require "able and skilful," but "competent" men. By-law 35 has really an entirely different object, namely, to make an apprentice the equivalent for certain purposes of a licensed lighterman. By-law 35, which was made under s. 80 of the Act of 1859, is also *ultra vires* if it bears the sense contended for, because it contradicts s. 66: *Kennaird v. Cory*. (1) The respondents rely on s. 54 of the Act of 1859, which provides that if any person, not being a freeman licensed or an apprentice qualified under the Act, acts as a lighterman, he shall be liable to a penalty; but an owner cannot be convicted under that section, and it only applies to the man in control of the lighter, not to the man assisting him. There is a further difficulty in the way of construing by-law 27 to mean that

(1) [1898] 2 Q. B. 578.

the men must be licensed lightermen, namely, that the areas covered by the Thames Conservancy and the Watermen's Company are not identical, that of the conservancy being the larger, and it is impossible that in parts of the river outside the jurisdiction of the Watermen's Company only licensed watermen are to be employed. *Perkins v. Gingell* (1) and *Goldsmith v. Slattery* (2) were wrongly decided, and ought not to be followed. Moreover, in those cases the point as to the invalidity of by-law 35 was not argued. Even if the "competent man" in by-law 27 must be a licensed man, the man in addition need not be, and, therefore, the conviction in *Buck v. Smith* was wrong.

The first and third cases raise a further question as to whether the barges were being "navigated" within the meaning of s. 66 of the Act of 1859 and by-law 27 respectively. Navigation means the intentional direction of a vessel towards a particular place by means of something on board the vessel herself. When a barge is pulled out of dock by motive power applied from the shore it cannot be said to be navigated: *Rolles v. Newell*. (3)

*Bankes, K.C.*, and *R. M. Montgomery*, for the respondents in all three cases.

[LORD ALVERSTONE C.J. We are all of opinion that by-law 27 is not ultra vires.]

The magistrates have rightly construed by-law 27 to mean that the two men must be duly licensed lightermen. Both the Watermen's Company under the Act of 1859 and the Thames Conservancy under their Act of 1857 and later Acts had power to make by-laws with regard to the navigation of barges on the Thames, including, amongst other matters, the number of men to be employed. The key to the interpretation of both sets of by-laws is to be found in s. 54 of the Act of 1859, which says that only licensed lightermen are to be employed on lighters. It follows from that provision that in construing by-law 27 the only test of competency to be employed is, Is the man a licensed lighterman? There is no other standard provided.

[DARLING J. It would certainly be most inconvenient if in

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(1) 2 Times L. R. 39.

(2) 63 L. T. 273.

(3) 25 Q. B. D. 335.



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every case under the by-law the qualification of the particular man had to be inquired into by the magistrate.]

Both by-law 27 and by-law 35 were framed in view of the provisions of s. 54: *Gosling v. Newton*. (1) It may be that outside the area of the Watermen's Company by-law 27 would have to receive a different construction, but that question does not arise in these cases. *Perkins v. Gingell* (2) and *Goldsmith v. Slattery* (3) were rightly decided and are in point.

With regard to the question of navigation, each case must depend on its own facts. In both cases the barges had got clear of the docks, and the magistrates rightly came to the conclusion on the facts that the barges had been navigated. *Rolles v. Newell* (4) does not lay down any general principle as to what constitutes navigation.

The first case also raises a question as to whether by-law 61 of the Watermen's Company is ultra vires, the magistrate having held that it was. It is not necessary to contend that his decision on that point was right, because he found as a fact that the case did not come within the by-law.

*Scrutton, K.C.*, replied.

*Cur. adv. vult.*

May 15. LORD ALVERSTONE C.J. These three cases raise interesting questions under the by-laws of the Thames Conservancy and the Watermen's Company. I will first deal with the question raised in the second and third of the three cases whether the competent man and the one man in addition (who are required by by-law 27 of the Thames Conservancy By-laws to be on board a lighter exceeding fifty tons when navigating the river) must be licensed lightermen or qualified apprentices under the Watermen's and Lightermen's Amendment Act, 1859. The point has been decided in two cases, to which I shall have to refer, but I think it better to deal with the matter in the first instance apart from authority, because in my opinion good reasons can be shewn for not departing from the previous decisions; even if we did not agree with them. The Thames Conservancy

(1) [1895] 1 Q. B. 793.

(2) 2 Times L. R. 39.

(3) 63 L. T. 273.

(4) 25 Q. B. D. 335.

By-law, No. 27, made in 1898, is in these terms: [His Lordship read the by-law.] For the point which we are now considering it is important to notice that by-law 27 is in practically the same terms as by-law 16 of 1872. If we were dealing with the by-law by itself without having to consider any other matters, I think that it would be difficult to say that the expression "competent man" means more than a person who, in the opinion of the adjudicating tribunal, is competent in the ordinary sense of the word; but, looking at the history of this question for over fifty years, I think that the expression must be given a more limited meaning. In a by-law made in 1860 under the Act of 1857, for which by-law 16 of 1872 was substituted, the expression was not "one competent man," but "one able and skilful person authorized by the Trinity House or the Watermen's Company," and it is admitted that for many years before 1857 the Watermen's Company had been licensing lightermen, and I think that fact throws some light on the substitution in 1872 of the expression "competent man" for the class of persons described in the earlier by-law.

The first objection taken to by-law 27 on behalf of the appellant is that it is ultra vires. That argument is based on s. 191 of the Thames Conservancy Act, 1894, which enumerates a large number of subject-matters in respect to which the conservators may make by-laws, four of which, in my opinion, bear directly on this matter. There is power to make by-laws "for the regulation, management, and improvement of the Thames and the navigation thereof." I think if that stood alone that it would be open to the observation that it probably referred only to the navigation of the Thames as a river, and related to shoals, banks, beacons, lights, and things of that sort. But the section also includes the following purposes: "For the regulation of vessels on the Thames; for the government, good order and regulation of persons navigating the Thames—and for regulating the navigation of the Thames with a view to the safety and amenity of the said river in relation to the purposes of this Act." It is difficult to say that those words are not sufficient to give power to make this by-law, and when one considers that those by-laws have been in existence for many years and were in existence when the Act of 1894 was

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passed, and have been acted on to the knowledge of the Legislature, I think that it is impossible to say that this by-law is *ultra vires*.

The next question is as to the meaning of the expression "competent man" in by-law 27. In construing these words one cannot overlook the fact that in 1859 was passed the Watermen's and Lightermen's Amendment Act, by s. 54 of which it is provided that "if any person not being a freeman licensed in pursuance of this Act shall at any time act as a waterman or lighterman" he shall be subject to a penalty. Thus, the Watermen's Company were empowered by the Legislature to say what persons should be qualified to work on the river, and although one finds that for the words "authorized by the Watermen's Company" in the by-law of 1860 there is substituted in by-law 16 of 1872 the word "competent," in my judgment no intention can be inferred from that mere change of words to destroy the statutory powers of the Watermen's Company. It is said that consideration is of no avail, because the jurisdiction of the Thames Conservancy and of the Watermen's Company are not co-terminous, there being a portion of the river within the area of the conservancy over which the Watermen's Company have no jurisdiction. I agree that difficult questions may arise with regard to the meaning of the by-law outside the limits of the Watermen's Company's jurisdiction, but that is not a practical question for the purpose of this case. Within the conservancy's limits the Watermen's Company were intended to have certain rights and powers, and it seems to me a reasonable construction to say that where a person is prevented by statute from acting as a lighterman without the authority of a certain body, the word "competent" may mean that he must have that authority. There is a by-law of the Watermen's Company, made under the Act of 1859, which strongly supports the view which I am expressing. It is by-law 35 of 1860, and it provides that in all cases in which it may be necessary that "two able and skilful persons shall be employed"—I pause there to note that at the date of that by-law the words "able and skilful" in the conservancy by-law had not been changed into "competent"—"one waterman or lighterman licensed in manner provided by

such Act and by-laws or an apprentice licensed to take the sole charge of craft and an apprentice actually bound in manner provided by such Act . . . shall be deemed and taken to be able and skilful persons"; or, for the present purpose, "shall be deemed and taken to be competent." It is true that that by-law does not enact that there must be two licensed lightermen, but I cannot read that by-law, which has existed now for many years, without coming to the conclusion that the conservancy recognized that the Watermen's Company had the power of licensing those who were employed on barges, and that the Watermen's Company recognized that the conservancy had power to make by-laws as to the number of persons required to be on board. The only other question on this part of the case is whether there is any distinction between the "competent man" and the "one man in addition." We were pressed to say that, even if the "competent man" must be a licensed lighterman, the "man in addition" need not be. Evidence was tendered before the magistrate for the purpose of proving that the second man was in fact competent in the ordinary sense of the word. Darling J. pointed out in the course of the argument, and I agree with him, that it is a very inconvenient thing that there should be a controversy in every case as to whether a particular man is competent; and therefore the reason and common sense of the matter are in favour of "competent" meaning competent according to some standard which did not have to be questioned in Courts of law. It was decided in *Perkins v. Gingell* (1) that the second man on a barge of over fifty tons must be a licensed lighterman. It is said that that decision is wrong. I agree that the reasons given in the report of the judgment are not altogether satisfactory, and it is to be observed that s. 54 of the Act of 1859 is not stated to have been referred to either in the arguments or in the judgments; but at any rate the decision is consistent with the parallel lines of jurisdiction and authority to which I have called attention. *Perkins v. Gingell* (1) was followed in *Goldsmith v. Slattery* (2), and it is not unimportant to observe that both cases were cited to the Court in *Gosling v. Newton* (3), and not

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(2) 63 L. T. 273.

(3) [1895] 1 Q. B. 793.



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the slightest doubt was thrown upon them. But even if I did not take the view that these cases in substance lay down the right principle, I am clearly of opinion that we ought not to overrule them. They have stood for nearly twenty years, and have been acted on constantly by magistrates, and been recognized in this Court, and both of these bodies have in the course of that period been in Parliament and their powers have been the subject of constant discussion and rearrangement. For these reasons, therefore, I have come to the conclusion that the decision of the magistrate in *Buck v. Smith* was right, and that the appeal must be dismissed.

Another question, and an entirely different one, is raised in *Gardner v. Doe* and also in *Keen v. Adams*, namely, whether on the facts found by the magistrates the barges were being "navigated" in one case within s. 66 of the Act of 1859 and in the other within by-law 27 of the Conservancy By-laws. The facts may be very shortly stated. In the first case one of the dock servants, for the purpose of getting three barges out of dock, fastened a rope to one of them and allowed them to drift up a little way, checking them with a rope round a bollard on the pierhead of the dock entrance. The rope not being long enough, another of the dock servants who was on board one of the barges poled them up with a hitcher for a distance of about sixty yards and made them fast to a post at the Sun Wharf some ninety or a hundred yards away. In the other case a barge was being sent out of the dock by hydraulic power, intending to drop her anchor just outside the dock gates. The anchor did not hold, and the barge drifted away, and was brought up ultimately by the man on board near some barges about 500 yards off. If the magistrate had found as a fact in either case that the barges were being navigated I doubt whether it could have been said that there was no evidence on which he could so find, but the question which we are asked to decide is whether the facts found must as a matter of law constitute navigation within the section or by-law. Without attempting to give an exhaustive definition of navigation, I think that there should in ordinary circumstances at least be an intention

to navigate the river as a channel leading from one place to another. Apart from authority, I think that pulling a barge out of dock by a rope, intending that it should be made fast to another barge or to a bollard a little way along the dock wall, there to remain until it is taken away to its destination either by oars or a tug, is not navigation; and so also, in the other case, the fact that the man was not able to bring the barge up as quickly as he intended does not cause that to become navigation which would not otherwise be so. In my opinion it would be putting a very artificial meaning on the word "navigation" if we were to hold that the facts in either of these cases amounted to navigation. This view is in harmony with the decision in *Rolles v. Newell* (1), where it was held that the master of a tug which towed thirty-one barges into a dock from a place just outside the dock was not navigating his tug. If it was right to say that it was not navigation to take barges from the river to the dock gates, so in these two cases it may also be said that the converse operation was not navigation.

The appeals in the first and third cases therefore succeed on the point as to navigation.

In the first case a question arose as to the validity of by-law 61 of the by-laws of the Watermen's Company. It has not been contended before us that the magistrate's decision on that point was right, and I only desire to say as to that that I see no ground for holding that that by-law is ultra vires.

RIDLEY J. I agree. I do not think it is necessary to go over all the ground again, but merely wish to say with regard to the construction of by-law 27 that I feel no difficulty in coming to the conclusion that the "one man in addition" must, equally with the first man, be a "competent" man. But the contention that "competent" means "licensed by the Watermen's Company" is one which I should have had more difficulty about, if there had not been the previous decisions, unless one can say that s. 54 of the Act of 1859 (which curiously enough does not seem to have been referred to in the former cases) makes the matter clear. As, however, I agree with my Lord that we ought not to overrule

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these cases, it is not necessary for me to say definitely whether I entirely agree with them.

DARLING J. I am of the same opinion, and I have nothing to add.

*Appeals in first and third cases allowed; appeal in second case dismissed.*

Solicitors for appellants in *Gardner, Locket & Hinton, Ltd. v. Doe and Keen v. Adams*: *Keene, Marsland, Bryden & Besant.*

Solicitors for appellant in *Buck v. Smith*: *J. A. & H. E. Farnfield.*

Solicitor for respondents: *F. A. S. Stern.*

F. O. R.

C. A

[IN THE COURT OF APPEAL.]

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31;  
June 1.

*In re* COUNTY COUNCIL OF DURHAM AND COUNTY BOROUGH OF WEST HARTLEPOOL.

*Local Government—Creation of County Borough—Loss of Borough's Contribution to County Expenses—Adjustment of Financial Relations—Compensation to County—Local Government Act, 1888 (51 & 52 Vict. c. 41), ss. 32, 62.*

By a provisional order and confirmation Act a borough theretofore forming part of a county was separated from the county and constituted a county borough, and thereupon the liability of the borough to contribute to the maintenance of the county bridges, and main roads, and certain other county expenses ceased. It was provided by the order that an equitable adjustment should be made respecting financial relations between the county and the county borough, and for the purposes of such adjustment the provisions of the Local Government Act, 1888, relating to adjustments between counties and county boroughs should apply:—

*Held* (affirming the judgment of Channell J.), that the loss of the contribution of the borough as aforesaid was a matter with respect to which the arbitrator appointed to adjust the financial relations between the county and the borough under s. 32 of the Local Government Act, 1888, had power to award compensation to the county.

*Caterham Urban Council v. Godstone Rural Council*, [1904] A. C. 171, distinguished.

APPEAL from the judgment of Channell J. upon a case stated by an arbitrator. (1)

(1) Reported [1905] 2 K. B. 340.

By the Borough of West Hartlepool Order, 1902, which was confirmed by the Local Government Board's Provisional Orders Confirmation (No. 12) Act, 1902:—

Art. II. "The borough" (of West Hartlepool, in that order referred to as the borough) "shall be constituted a county borough, and all the provisions of the" (Local Government Act, 1888, in that order referred to as the Act) "respecting county boroughs shall apply to the borough as if the borough had been named in the 3rd schedule to the Act, and as if Durham had been specified in that schedule as the county in which the borough should be deemed for the purposes of the Act to be situate."

Art. III. (1.) "An equitable adjustment shall be made respecting the distribution of the proceeds of the local taxation licences, of the estate duty, and of the local taxation (customs and excise) duties, and respecting all other financial relations or questions between the administrative county" (of Durham, in that order referred to as the administrative county) "and the borough."

(2.) "Any such adjustment between the administrative county and the borough shall be made by agreement between the council of the administrative county and the" (corporation of West Hartlepool, in that order referred to as the) "council of the borough within six months from the commencement of this order. . . . In default of agreement between the parties concerned in the case of any such adjustment as aforesaid the adjustment may be made by the Local Government Board or if that Board think fit by an arbitrator appointed by them."

(3.) "For the purposes of any such adjustment as aforesaid the provisions of the Act relating to adjustments between administrative counties and county boroughs shall apply with the necessary modifications and the Local Government Board or an arbitrator appointed by them as the case may be shall be substituted in such provisions for the commissioners appointed under the Act, and notwithstanding anything in the provisions of this order or of the Act any such adjustment and the determination of any matter incidental or in relation

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thereto or consequent thereon shall when made by the Local Government Board be deemed to be made by them otherwise than as arbitrators, and any arbitrator appointed by them shall be deemed to be an arbitrator within the meaning of s. 62 of the Act, and the provisions of the Act shall apply accordingly: Provided—(A) that in lieu of sub-s. 6 of s. 61 of the Act, sub-ss. 1 and 5 of s. 87 of the Act shall apply to any inquiries which may be directed by the Local Government Board under this article and to the costs of such inquiries; and (B) that sub-s. 6 of s. 32 of the Act shall apply to any agreement or any award made under this article.”

No equitable adjustment having been made by agreement between the county council of Durham and the council of the county borough of West Hartlepool within the six months specified in the order, the Local Government Board appointed Sir Hugh Owen as arbitrator to make the equitable adjustment. The arbitrator so appointed duly made his award, and with regard to a large portion of the sums directed by the award to be paid by the county council and the council of the county borough respectively no question arose, but with regard to certain other payments claimed by the parties respectively the arbitrator was requested to state his award in the form of a special case.

The particulars of the claims in question and the facts found by the arbitrator with regard to them are as follows:—

The county council claim that they shall be paid by the council of the county borough, in addition to the sums that under the other clauses of the award are to be paid by that council, the following sums:—

(1.) 5928*l.* in respect of the repair, maintenance, and improvement of county bridges;

(2.) 32,610*l.* in respect of the repair, maintenance, and improvement of main roads; and

(3.) 8174*l.* in respect of discontinuing contributions to miscellaneous expenses, being the expenditure of the county council on salaries, registration of voters other than parliamentary ownership voters, law charges, printing and stationery, weights and measures department, health department, election expenses,

county rate basis expenses, petty sessional courts in the county, and office expenses.

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The county council claim the sums specified above, and numbered 1, 2, and 3 on the ground that, owing to and since the constitution of the county borough, they have been deprived of, and will for the future be deprived of, all contributions from the area within the county borough towards the expenses incurred by them in respect of the several purposes to which the claim relates, and the liability for such expenses is now and will continue to be imposed solely on the area of the county as diminished by the area which has been formed into the county borough. It is admitted by the council of the county borough that there are no county bridges or main roads within the area of the county borough, and that the contributions from the area within the county borough towards miscellaneous expenses have in past years prior to the constitution of the county borough exceeded the amount of such expenses incurred by the county council for that area.

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The council of the county borough claim that they shall be paid by the county council, in addition to the sums which under other clauses of this award are to be paid by that council, the following sums :—

(4.) 3225*l.* in respect of children in industrial schools and in reformatories;

(5.) 3214*l.* in respect of subsidized roads; and

(6.) 305*l.* in respect of fines.

With regard to the item numbered 4, the council of the county borough claim the said sum of 3225*l.* on the ground that, owing to and since the constitution of the county borough, an increased burden has been thrown on the area within the county borough in respect of the expenses of the maintenance of children in industrial schools and reformatories, and that the burden on the area now comprised in the county has been thereby diminished. It is admitted by the county council that the contributions from the area within the county borough towards such expenses have in past years prior to the constitution of the county borough been much less than the actual expenditure of the county council in respect of the maintenance

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With regard to the item numbered 5, the council of the county borough claim the said sum of 3214*l.* on the ground of the loss which the area within the county borough has sustained by reason of the discontinuance of the contributions which prior to the constitution of the county borough were made by the county council under s. 11, sub-s. 10, of the Local Government Act, 1888, towards the cost of the maintenance, repair, enlargement, and improvement of highways (not being main roads) in the area within the borough. It is admitted by the county council that during the three years next before October 1, 1902, they made, under the powers conferred on them by the said Act, voluntary contributions towards the cost of highways (not being main roads), in the area within the county borough, and that since the constitution of the county borough such contributions by the county council have necessarily ceased.

With regard to item numbered 6, the council of the county borough claim the said sum of 305*l.* on the ground that prior to the constitution of the county borough the share of the area within that borough in the proceeds of the fines levied at petty sessions throughout the county was on the basis of its rateable value in excess of the fines so levied in that area; that since the county borough was constituted the area within that borough has lost the allocation of that excess, and that in consequence an additional sum is available for allocation to the county. It is admitted by the county council that prior to the constitution of the county borough the share in the proceeds of the said fines which on the basis of its rateable value was allocated to the area within the county borough was in excess of the fines actually levied in that area.

It is agreed by the county council and the council of the county borough that if under an adjustment under the said order and the provisions of the Local Government Act, 1888, either of those councils has a valid claim against the other in respect of any of the items of claim above mentioned in consequence of the loss sustained by reason of the constitution of

the county borough, the sum stated above in connection with each such item shall be deemed to be the sum which represents the amount of the loss.

The questions for the opinion of the Court are:—

(1.) Whether the loss sustained by the county council is, under Art. III. of the said Borough of West Hartlepool Order, 1902, and the provisions of the Local Government Act, 1888, therein referred to, the subject of a valid claim against the council of the county borough in the case of any of the items of claim numbered 1, 2, and 3, and, if so, which.

(2.) Whether the loss sustained by the council of the county borough is, under the said order and provisions, the subject of a valid claim against the county council in the case of any of the items numbered 4, 5, and 6, and, if so, which. (1)

(1) By the Local Government Act, 1888, s. 32, sub-s. 1: "An equitable adjustment respecting the distribution of the proceeds of the local taxation licences and probate duty grant, and respecting all other financial relations, if any, between each county and each county borough specified in the said schedule as being deemed for the purposes of this Act to be situate in that county, shall be made by agreement, within twelve months after the appointed day, between the councils of each county and each borough, and in default of any such agreement, by the commissioners appointed under this Act; and such adjustment shall provide in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute, and save as provided by this Act any existing liability to contribute or to incur expense shall, after the appointed day, cease, and an equitable provision for such cessation shall be made in the adjustment."

Sub-s. 3: "In such adjustment

regard shall be had to the existing property debts and liabilities (if any) connected with the financial relations of the county and borough, and to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant as provided by this Act, and to the amount of benefit and value of the services which the borough receives in return for existing contributions, if any, and to all the circumstances of each case which it appears equitable to consider."

Sect. 62, sub-s. 1: "Any councils and other authorities affected by this Act, or by any scheme order or other thing made or done in pursuance of this Act, may from time to time make agreements for the purpose of adjusting any property, income, debts, liabilities, and expenses, so far as

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Channell J. gave judgment answering these questions in the affirmative.

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May 25, 28, 31. *Cripps, K.C.*, and *Macmorran, K.C.* (*Fleetwood Pritchard* with them), for the county borough of West Hartlepool. This case is governed by the decision of the House of Lords in *Caterham Urban Council v. Godstone Rural Council*. (1) The House of Lords held in that case that in cases of this kind, where there is a severance of areas under the Local Government Act, 1888, compensation to one area by the other in respect of loss of future income arising from the severance is not contemplated by the Legislature, and that "adjustment" in respect of existing liabilities and expenses, or financial relations, does not include such compensation. It is true that the case in the House of Lords turned upon s. 62 of the Local Government Act, 1888, whereas the present case turns to some extent on s. 32 of that Act; but it is submitted that the same principle applies to the construction of both sections. The reason why such a severance of areas takes place is that there has been a change of circumstances, rendering it no longer just or equitable that they should be united for the purposes of expenditure or liability, and to hold that there is under these circumstances a liability imposed upon one of the areas to compensate the other for loss of future income arising from the severance would be pro tanto to nullify the very object with which the Legislature has authorized the severance. As soon as the two areas are severed, different conditions, both as to expenditure and rateability, arise; and to impose a liability on one area to compensate the other in respect of the severance would be to impose a burden which might be without corresponding benefit and most inequitable. If, as suggested, the compensation is to be arrived

affected by this Act or such scheme order or thing, of the parties to the agreement, and the agreement and any other agreement authorized by this Act to be made for the purpose of the adjustment of any property,

debts, liabilities or financial relations may provide for the transfer or retention of any property debts and liabilities," &c.

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at by capitalizing the future loss of income involved by the cessation of the liability of the borough to contribute, the effect might be nearly to undo the advantage of the severance to the borough. In *Caterham Urban Council v. Godstone Rural Council* (1) "adjustment" was distinguished from "compensation" as being confined to a division of existing assets and liabilities, whereas "compensation" would properly be held to include loss of future income by reason of severance of part of an area. The presence of the term "financial relations" in s. 32 does not help the respondents, for that term also occurs in s. 62, and was held in *Caterham Urban Council v. Godstone Rural Council* (1) to apply to the financial relations between the two parts of the divided area in respect of existing liabilities and obligations. The group of sections in the Local Government Act, 1888, beginning with s. 54 and including s. 62, deals with the future alteration of boundaries. Sect. 54 provides for the alteration of the boundaries of counties and boroughs; s. 57 provides for the alteration of the boundaries of county districts and parishes and the creation of urban districts; and ss. 59 and 62 apply, and provide for adjustment of property and liabilities, both in cases under s. 54 and s. 57. Sect. 62 is not merely a procedure section, providing machinery for doing that which the power to do is derived from elsewhere, but shews what the rights of the two areas upon their severance are intended to be. [They also referred to *In re Rochdale Union and Haslingden Union* (2) and *In re Bucks County Council and Herts County Council*. (3)]

*Montague Shearman, K.C.*, and *Simey*, for the county council of Durham. The case of *Caterham Urban Council v. Godstone Rural Council* (1) does not govern the present case. Sect. 32 of the Local Government Act, 1888, did not apply to that case, and the terms of the order there made no special provision as to the respective rights and liabilities in the future of the two areas on the severance. In the present case the order incorporates s. 32. Looking at the terms of that section generally, it is submitted that the intention clearly was that,

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upon the severance of a county borough from the area of the county, the ratepayers in the two areas should not respectively be placed in a worse financial position by reason of the cessation of the liability of one area to contribute to the expenses of the other. It is not contended that the meaning is that "compensation" must necessarily be awarded in the sense that there is to be a capitalization of the estimated loss of future income. Sub-s. 1 of s. 32 provides that there shall be an equitable provision for the cessation of an existing liability to contribute in the adjustment, and sub-s. 3 provides that in such adjustment regard shall be had to the consideration that the county is not to be placed in any worse financial position by reason of a borough therein being constituted a county borough. That phraseology clearly points to the loss of income in future by reason of a part of the rateable area of the county being severed from it. It is suggested that s. 62 in some way negatives the right of the county to claim an allowance in respect of such loss of income; but it was held in *Caterham Urban Council v. Godstone Rural Council* (1) that s. 62 was merely a procedure section, providing the machinery for adjustment of rights to property and liabilities between the two portions of a divided area, and not an endowing section, giving rights quoad the future. Sect. 32 is such a section as last mentioned. There is no provision in s. 62, as there is in s. 32, indicating that neither of the portions of a severed area is to be placed in a worse financial position by reason of the severance. Sect. 32 is not expressly referred to in the judgment of the House of Lords in *Caterham Urban Council v. Godstone Rural Council*, but it would seem from a passage in Lord Halsbury's judgment (1) that he must have had that section in his mind in saying what he there said; and, if so, it is clear that, in his opinion, a case to which that section applied would stand on a different footing from the case which was then before the House of Lords.

*Macmorran, K.C.*, in reply.

*Cur. adv. vult.*

June 1. VAUGHAN WILLIAMS L.J. This is an appeal from a judgment of Channell J. on a special case answering two questions

(1) [1904] A. C. 171, 172.

submitted by an arbitrator in the affirmative. Those questions were—(1.) whether the loss sustained by the county council is, under Art. III. of the said Borough of West Hartlepool Order, 1902, and the provisions of the Local Government Act, 1888, therein referred to, the subject of a valid claim against the council of the county borough in the case of any of the items of claim numbered 1, 2, and 3, and, if so, which; (2.) whether the loss sustained by the council of the county borough is, under the said order and provisions, the subject of a valid claim against the county council in the case of any of the items numbered 4, 5, and 6, and, if so, which.

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In order to understand those questions one must go to a certain extent into the facts which appear on the special case. It begins with a statement of the material parts of the Borough of West Hartlepool Order, 1902. Art. II. of that order provides that the borough of West Hartlepool shall be constituted a county borough, and all the provisions of the Local Government Act, 1888, respecting county boroughs shall apply to that borough as if it had been named in the Third Schedule to the Act, and as if Durham had been specified in that schedule as the county in which the borough should be deemed for the purposes of the Act to be situate. Art. III. (1.) provides that "an equitable adjustment shall be made respecting the distribution of the proceeds of the local taxation licences, of the estate duty, and of the local taxation (customs and excise) duties, and respecting all other financial relations or questions between the administrative county of Durham and the borough." Art. III. (2.) provides that any such adjustment shall be made by agreement between the council of the administrative county and the council of the borough within six months from the commencement of the order, and, in default of agreement between the parties concerned, the adjustment may be made by the Local Government Board, or, if that Board think fit, by an arbitrator appointed by them. The arbitrator in the present case was appointed under that provision. Then Art. III. (3.) provides (*inter alia*) that, for the purposes of any such adjustment, the provisions of the Local Government Act, 1888, relating to adjustments between administrative counties and county boroughs shall apply with the



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necessary modifications, and that any arbitrator appointed by the Local Government Board shall be deemed to be an arbitrator within the meaning of s. 62 of the Act, and the provisions of the Act shall apply accordingly, provided (A) that in lieu of sub-s. 6 of s. 61 of the Act, sub-ss. 1 and 5 of s. 87 of the Act shall apply to any inquiries which may be directed by the Local Government Board under this article, and to the costs of such inquiries; and (B) that sub-s. 6 of s. 32 of the Act shall apply to any agreement or any award made under this article.

It would seem, therefore, that the arbitration in this case must be regarded as an arbitration within s. 62 of the Act of 1888. But, in my opinion, s. 62 is a section dealing with procedure; and an arbitrator may be appointed under that section to deal with questions arising under s. 32, or any other section in the Act; or, in other words, it does not follow, because the arbitrator is appointed under s. 62, that the questions which he has to determine must necessarily all arise under that section. It is not necessary for the purposes of this case to determine to what extent questions may arise under s. 62. The order, which constituted West Hartlepool a county borough, having provided that the Act of 1888 shall apply to it as if it had been named in the Third Schedule to the Act, the result is that s. 32 of the Act applies to the case; and the question which we have to consider appears to me to depend entirely on the construction of that section. The reason why the true construction of that section becomes so important in this case is that there is a case decided by the House of Lords, namely, *Caterham Urban Council v. Godstone Rural Council* (1), which raised a question as to the adjustment of financial relations between severed areas that on the surface appears very similar to that raised in the present case. When, however, the matter is looked into, it becomes manifest that that case turned, not on s. 32, but on s. 62 of the Local Government Act, 1888; and that, although the question we have to answer in the present case as to the adjustment of financial relations between the county borough of West Hartlepool and the county of Durham is superficially very like that which the House of Lords decided in *Caterham Urban Council v. Godstone*

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*Rural Council* (1), the correct answers to the two questions may be quite different, because they respectively depend on the construction of different sections.

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In order to understand the questions raised by the arbitrator in this case, it is necessary to turn to the paragraphs of the special case which state the particulars of the claims made by the county council and the council of the county borough respectively. These particulars are as follows. The county council claim that they shall be paid by the council of the county borough, in addition to the sums that under the other clauses of the award are to be paid by that council, the following sums : (1.) 5928*l.* in respect of the repair, maintenance, and improvement of county bridges ; (2.) 32,610*l.* in respect of the repair, maintenance, and improvement of main roads; and (3.) 8174*l.* in respect of discontinuing contributions to miscellaneous expenses, being the expenditure of the county council on salaries, registration of voters other than parliamentary ownership voters, law charges, printing and stationery, weights and measures department, health department, election expenses, county rate basis expenses, petty sessional courts in the county, and office expenses. The county council claim the sums specified above, and numbered 1, 2, and 3, on the ground that, owing to and since the constitution of the county borough, they have been deprived of, and will for the future be deprived of, all contributions from the area within the county borough towards the expenses incurred by them in respect of the several purposes to which the claim relates, and the liability for such expenses is now, and will continue to be, imposed solely on the area of the county as diminished by the area which has been formed into the county borough. It is admitted by the council of the county borough that there are no county bridges or main roads within the area of the county borough, and that the contributions from the area within the county borough towards miscellaneous expenses have in past years prior to the constitution of the county borough exceeded the amount of such expenses incurred by the county council for that area. Then follow particulars of cross-claims made by the council of the county borough against the county

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council, and numbered 4, 5, and 6, and the grounds upon which those claims are based.

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As I have said, in my opinion the questions raised by these claims depend entirely on the true construction of s. 32 of the Act of 1888, but it will be convenient, before going through that section, to consider more particularly what was decided in the case of *Caterham Urban Council v. Godstone Rural Council* (1), and what bearing the opinions expressed by the learned Lords in that case have upon the present case. The head-note of the report of that case in the House of Lords is as follows: "By order of a county council under s. 57 of the Local Government Act, 1888, a parish which was part of a rural district was separated from that district and made an urban district, and the parish ceased to be rated for the highway expenses of the rural district:—Held, that the loss of this contribution was not a matter which required to be adjusted between the rural district and the new urban district under s. 62 of the Local Government Act, 1888. That section does not give compensation for any such loss of profit. The word 'income,' in s. 62 means existing income, and does not include income which may afterwards be derived from making rates." One cannot read that head-note without seeing that, upon a comparison of the question raised in that case with the question raised by the award in the present case, the two questions appear to be in many respects the same. There can be no doubt that the claim in the present case is very much in the nature of what may be properly described as a claim for compensation, as distinguished from mere adjustment of liabilities, it really being a claim in respect of future income which has been lost by reason of the area of the county borough having been carved out of the area of the county of Durham; but the answer to the suggestion that the case of *Caterham Urban Council v. Godstone Rural Council* (1) is an authority against such a claim appears to me to be that which was given by Channell J., namely that that case depended on s. 62 of the Act of 1888, whereas the present case depends on s. 32; and, describing their character generally, s. 62 is a

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procedure section, and s. 32 is an endowment section, in the sense that it gives the county council a right to be placed in no worse financial position by reason of the county borough being constituted out of the area of the county. It, therefore, seems to me that the Court is left at large to put what they consider to be the proper construction on s. 32, and that, in the performance of that duty, they are not concluded in any way by the decision in the case of *Caterham Urban Council v. Godstone Rural Council*. (1)

The provisions of s. 32 are as follows: [The Lord Justice here read sub-s. 1 of the section.] Now, in reference to the provision in that sub-section that "existing liability to contribute or to incur expense shall after the appointed day cease, and an equitable provision for such cessation shall be made in the adjustment," it is not disputed that, at the time when this section had to be applied to the case of the county of Durham and the county borough of West Hartlepool, there was an existing liability on the part of the borough to contribute to the county expenses in respect of various matters, of which I may take the main roads as an example. There were other existing liabilities on the one side and the other to make contribution and incur expense. When the section provides that an equitable provision for the cessation of such liabilities shall be made in the adjustment, it seems to me impossible to doubt that it was intended that something in the nature of compensation should be given to the county or the county borough, as the case might be, for any loss which accrued to it by such cessation. Then sub-s. 3 of the section provides that "in such adjustment regard shall be had to the existing property, debts, and liabilities (if any) connected with the financial relations of the county and borough, and to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant as provided by this Act, and to the amount of benefit and

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value of the services which the borough receives in return for existing contributions, if any, and to all the circumstances of each case which it appears equitable to consider." I cannot see how these words can have their effect, or how the adjustment provided for can be made, unless, in a case in which the county is really placed in a worse financial position by reason of a borough therein being constituted a county borough, the adjustment is made in the shape of a payment by the one party to the other. I am not at all certain that the Act necessarily contemplated a capital payment, but we have not got to consider that question, because I understand that in the present case the parties agree that, if compensation is payable, it should be made by way of such a payment. I do not know that any useful purpose would be served by my labouring any further the question of the construction of s. 32. I think that the words of the section are amply sufficient to provide for making such an adjustment, either by way of annual or capital payment, as will do complete justice between the parties, and to enable the arbitrator to say what is to be paid by one party or the other on the balance of the various considerations applicable. As I have said, I do not think that the case of *Caterham Urban Council v. Godstone Rural Council* (1) fetters us at all in the construction of s. 32. I think that s. 32 and s. 62 must be construed quite independently of one another. When one looks at the cases bearing on these questions, beginning with *In re Bucks County Council and Herts County Council* (2) and ending with *Caterham Urban Council v. Godstone Rural Council* (1), in the House of Lords, one sees that, all the way through, the constant struggle has been to make out that, in the construction of s. 62, such a provision as is contained in s. 32 must be read into it, shewing plainly enough that those who argued those cases felt that it made all the difference whether, in respect of the matters in dispute, such terms as are present in s. 32 were applicable or not.

I shall do no more in this case than refer to some passages in the judgment of Channell J. in the Court below. It will be found that the argument turned on the distinction between the wording of s. 32 and that of s. 62; and the presence of

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the words "financial relations" in both these sections gave rise to an argument on one side that both the sections ought to be construed in the same way. That point was dealt with specifically by Channell J., and I quite agree with what he said on the subject. I really need not do any more to shew the basis generally of his judgment than read the following passage at the top of p. 349 of the report in the Law Reports. He said, "Sub-s. 3 is also important"; and then, after reading the subsection, he proceeded as follows: "I do not think that that means that the maintenance of the former financial position is to be limited to the financial position with respect to the licence duties and probate duty. The reference to those duties is introduced somewhat inartistically as an illustration of what was intended. I understand the words to mean that the parties respectively are not to be placed in a worse position generally. The scheme was to alter the machinery of local government, but to leave the large boroughs and the counties as far as possible in the same financial position that they were in before." That passage very plainly shews the basis of the learned judge's judgment, with which I agree. I cannot help saying, though it may not affect the construction of s. 32, that it appears to me most reasonable for the Legislature to have made a provision of this kind with regard to the financial relations between county boroughs and county councils: because it is manifest that, if some such provision as I have held to be intended in s. 32 were not made, the ratepayers in the county might often be placed in a position in which they would be subjected to intolerable burdens. As county boroughs were created, and a great number of ratepayers were so taken out of the county, the position of the diminished number of ratepayers left in the area of the county might become one of the greatest hardship. Therefore it seems to me to be a most reasonable provision for the Legislature to make that, notwithstanding the formation of county boroughs and their endowment with the rights of self-government and taxation, their contributions towards county expenses, of which the whole county, including the borough, had the benefit, though the subject-matter of them might not have been within the area of the borough, should in some shape continue. The

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way in which the Legislature has worked that out is by saying that the contributions of the borough shall for the future cease, but that, in the adjustment of the financial relations between the county borough and the county, provision shall be made for preventing the county from being placed in a worse financial position than before. For these reasons I think that the appeal should be dismissed.

STIRLING L.J. I also think that the judgment of Channell J. should be affirmed, and I will state shortly my views on the point raised in this case. The borough of West Hartlepool was by an order of the Local Government Board, confirmed by Act of Parliament, constituted a county borough, and so was severed from the administrative county of Durham. Questions thereupon arose as to whether the county on the one hand and the county borough on the other hand were entitled to make certain claims as against each other, and there has been an arbitration upon the matters in difference before an arbitrator appointed by the Local Government Board. One of these claims may be taken as typical of the whole. I select that which relates to the repair and maintenance of main roads. These roads are within the area of the county, and do not pass through the borough, though they approach nearly thereto. Down to the time of the provisional order the parishes in West Hartlepool contributed to the maintenance of those roads in the county, the sums necessary for that purpose being raised by assessment of those parishes. Those roads have still to be maintained by the administrative county of Durham, but no part of them will be maintained by the borough, as no part of them is within its area. In these circumstances the county council of the administrative county of Durham have made a claim that the loss which they will sustain with regard to those roads should in some way be made a subject of adjustment as between them and the county borough of West Hartlepool, the exact form of which adjustment it is not necessary for us to consider in the present case. That is the matter in dispute. It is contended for the county council, and denied by the borough council, that some kind of compensation

should be awarded in respect of the matter. Of course the inhabitants of the borough of West Hartlepool will get as much benefit from the roads as they formerly got ; and, if the contention on their behalf is right, they will get that benefit without in any way contributing to the repair and maintenance of the roads.

The question appears to me to turn on s. 32 of the Local Government Act, 1888, which, by the terms of the provisional order, is made applicable to the case. Sub-s. 1 of that section provides for an equitable adjustment in respect of financial relations between the county and the county borough, and certain directions are thereby given as to such adjustment, the most material words being at the end of the sub-section, where it is provided that, “ save as provided by this Act, any existing liability to contribute or to incur expense shall after the appointed day cease, and an equitable provision for such cessation shall be made in the adjustment.” The question thus arises whether the liability of the parishes in West Hartlepool to pay the sums raised, as I have mentioned, by assessment of those parishes to the county rate in respect of the main roads is a liability to contribute within the meaning of those words. That question appears to be answered by sub-s. 9 of s. 32, which provides that “ expressions in this section relating to contributions by a borough to a county shall be construed to include any sum raised by the assessment of the parishes or hereditaments in the borough to the county rate.” That being so, the effect of the section is that the liability to contribute the sums raised by the assessment of the parishes in the borough, as before mentioned, is to cease, and an equitable provision for such cessation is to be made in the adjustment. The arbitrator appears to have made such a provision, and it is not for us to say whether he has fixed on a proper amount in his award. I am confirmed in the view I take of sub-s. 1 by a following sub-section, namely, sub-s. 3, which provides that in the adjustment regard is to be had “ to the consideration that the county is not to be placed in any worse financial position by reason of the boroughs therein being constituted county boroughs, and that a county borough is not to be placed in a worse financial position than it would have been in if

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it had remained part of the county and had shared in the division of the sums received by a county in respect of the licence duties and the probate duty grant as provided by this Act, and to the amount of benefit and value of the services which the borough receives in return for existing contributions, if any, and to all the circumstances of each case which it appears equitable to consider." I agree with Channell J. that those latter words extend to other matters than the division of the licence duties and probate duty grant, which are among the matters contemplated. I agree with the conclusion at which he arrived and the reasons which he gave. I only wish further to say that I think that in coming to that conclusion we are in no way departing from the decision of the House of Lords in the case of *Caterham Urban Council v. Godstone Rural Council*. (1) That case turned on ss. 57, 59, and 62 of the Act of 1888, and in none of those sections do we find such language as that which is to be found in sub-ss. 1, 3 and 9 of s. 32, and upon which, as it appears to me, the whole of the present case turns.

FLETCHER MOULTON L.J. I am of the same opinion. This case raises an interesting question, which depends upon the interpretation of the language of certain sections of the Local Government Act, 1888. The object of that Act was to reorganize the administrative units of this country, which, as they existed at the time of the passing of the Act, had been largely inherited from a distant past, and had become in various respects out of harmony with existing conditions, both social and economical. The work which had to be done was twofold. Arrears from the past had to be made up, and provision had to be made for future rearrangements which might become necessary. The most serious instance of arrears from the past was that a large number of important boroughs fully capable of independent local self-government still remained for administrative purposes part of the county. This was straightway remedied. More than sixty such boroughs were by the Act constituted county boroughs; and, as this change was effected by the Act itself, it was necessary that the Legislature should lay down in that Act

(1) [1904] A. C. 171.

the terms on which the severance of these boroughs from the county should take place. This it did in s. 32, and the carrying out of the provisions of this section was entrusted to a strong body of commissioners armed with ample powers, which are defined in s. 61. But, as I have already said, it was also necessary to provide for rearrangements that might become desirable in the future; and accordingly provisions were inserted in the Act for the purpose of effecting from time to time such rearrangements. The work of effecting an important class of such future rearrangements, namely, of constituting county boroughs and separating them from the counties of which they had previously formed part, is provided for by s. 54. The procedure adopted in these cases is that an inquiry is to be held, and a provisional order made by the Local Government Board, and this provisional order has subsequently to be confirmed by Act of Parliament. Minor rearrangements, relating to less important areas, which did not need so elaborate a procedure (such, for instance, as the alteration of the boundary of county districts and the creation of urban districts), are dealt with separately by s. 57, the procedure in their case being that the county council may make an order providing for the necessary alterations, which is to be confirmed by the Local Government Board, and, when so confirmed, is to be laid on the table in both Houses of Parliament, and in due time becomes binding. The present case and that of *Caterham Urban Council v. Godstone Rural Council* (1) are, respectively, examples of the application of these two sets of provisions. In the latter case the proceedings were under s. 57. In the present case they were under s. 54, the operation being that of carving out of the area of the county a new county borough.

In the case of *Caterham Urban Council v. Godstone Rural Council* (1) the order creating the urban district apparently included no special direction as to the terms on which its severance from the rural district was to take place. I am not prepared to say that it could, to any great extent, have imposed such terms, because the language of s. 57 seems to give no wide powers to the county council and the Local Government Board in that respect. I need not, however, deal

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with that point, because, as a matter of fact, it appears that no such terms were imposed. When the necessary adjustment came to be made in that case between the urban district, which I may call the outgoing partner, and the remainder of the rural district, of which it had previously formed a part, the latter sought to claim an allowance in respect of the loss of the parish of Caterham. There being no special terms in the order under which it could obtain such an allowance, it must, if it was to obtain it, do so under the provisions of the Act of 1888. Therefore it was contended that the allowance claimed might be given under s. 62 of that Act. But when s. 62 is looked at, it will be seen that it is a procedure section and not (if I may use such a phrase) an endowment section. It does not of itself confer rights, it simply provides machinery by which rights obtained aliunde are to be worked out. This cannot be expressed better than by Lord Davey in *Caterham Urban Council v. Godstone Rural Council*. (1) He there says: "When a severance takes place of an administrative unit, some adjustment is necessary. There are, or may be, common property or income, debts, liabilities, or expenses owing or incurred by or on behalf of the undivided area. These matters require adjustment, and s. 62 appears to me to be nothing more than a procedure section for enabling such matters to be adjusted. But the respondents have no vested interest in the profit to be derived from the Caterham highway rates after severance, and there is no abstract right of either of the parties to be compensated by the other for any future financial detriment arising from acts directed or authorized by the Legislature, and, in my opinion, there is nothing in the Act which creates such a right."

In the present case, however, the order, which is now part of an Act of Parliament, does make provision as to the terms on which the severance of the county borough from the area of the county is to take place; and, as the order has been confirmed by Act of Parliament, no question can arise whether these terms go beyond the terms of the Act of 1888, so as to be ultra vires as regards that Act. By the terms of the order the county borough of West

(1) [1904] A. C. 171, at p. 176.

Hartlepool is to be placed in exactly the same position as it would have been in if it had been a county borough included in the Third Schedule to the Act of 1888. The consequence is that the claims of the borough and the claims of the county must respectively be treated in the same manner as if that had been the case. We must, therefore, turn to the provisions of the Act of 1888, in order to see what its terms are with respect to such boroughs; and here we see the gulf that divides this case from *Caterham Urban Council v. Godstone Rural Council*. (1) It may or may not be that the adjustment must be made by the same machinery as in that case. It is not necessary to decide this, but in view of the fact that special machinery is provided by s. 32 for the purposes of that section, I think that the better view is that the arbitrator in the present case was acting partly under s. 62 and partly under s. 32, having in his hands, therefore, the great powers which were given under that section and s. 61 to the Commissioners. But, whatever may be the machinery applicable, we have here to deal with an endowing section, by which certain rights were specifically given in such cases to county boroughs and counties. The complete absence of any such section and indeed of any terms giving special rights in the case of *Caterham Urban Council v. Godstone Rural Council* (1) renders it impossible that the decision in that case should govern the present case.

Although the decision of the House of Lords in the *Caterham Case* (1) did not depend in any way on the meaning or effect of s. 32 of the Act of 1888, that section must have been referred to in the course of the argument. It was probably relied on by counsel for the Godstone Rural Council, as shewing some statutory recognition of the fairness of such an allowance as they were claiming. On page 172 the Lord Chancellor says: "The language of the section now under construction does not seem to me to be appropriate to the compensation of one district for being placed in a less advantageous financial position than before the alteration in its boundaries. This is language which the Legislature has used elsewhere, when what is now contended

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for was contemplated by the Legislature, but I do not think that the 62nd section ever contemplated 'adjustment' as being applicable to such a state of things as has been brought about by a diminution of rateable area."

This can only refer to s. 32, where it is provided that the adjustment is to be made subject to the consideration that the county is not to be placed in a worse (i.e., a less advantageous) financial position by reason of a borough therein being constituted a county borough. I, therefore, think that Lord Halsbury must have had that provision in his mind, and he expresses his opinion that, when the Legislature used these words, it contemplated such an allowance as was there claimed by the Godstone Rural Council and which was identical with what is claimed by the County Council of Durham in the present case.

But, be this as it may, we have to consider what the adjustment is to be under s. 32. This must depend entirely upon the language of that section, which seems to me to be very plain. It clearly includes the consideration of future expenses, for it enacts that there shall be an adjustment providing "in the case of any expenses which may in future be incurred by the county wholly or partly on behalf of the borough for the liability of such borough to contribute, and, save as provided by this Act, any existing liability to contribute or to incur expense shall after the appointed day cease," and that "an equitable provision for such cessation shall be made in the adjustment." Those words must refer to the future effects of the cessation of the liability to contribute which is so made to cease, and therefore it is clear, in my opinion, that something in the nature of compensation for these future contributions is contemplated. When you also find that by sub-s. 3 of s. 32 the principle of the adjustment is to be that the county is not to be placed in any worse financial position by reason of the borough therein being constituted a county borough, it becomes still more clear that what the Legislature had in view was some allowance in the nature of what may be properly called compensation, by means of which the county was to be prevented from suffering financially by reason of the change made in its boundaries.

I am of opinion, therefore, that the judgment appealed from was right and that this appeal should be dismissed.

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*Appeal dismissed.*

Solicitors for county council of Durham: *Maude & Tunncliffe, for R. Siney, Durham.*

Solicitors for borough of West Hartlepool: *Baker & Co., for Higson Simpson, West Hartlepool.*

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*In re* BRIGGS & CO.

*Ex parte* WRIGHT.

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*May* 28.

*Bankruptcy—Partnership—Book Debts—Assignment by Deed—One Partner's Signature a Forgery—Validity of Assignment—The Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 6—The Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25.*

One of the two partners of a firm purported by deed to assign the book debts of the firm as security for a debt due by the firm, and signed the deed in his individual name and also (without authority) in the name of his partner :—

*Held* that, whether or not the deed was valid as a deed, it operated as a good equitable assignment, for that it was, within s. 6 of the Partnership Act, 1890, an act or instrument relating to the business of the firm, and done in a manner shewing an intention to bind the firm by a partner who, by reason of the partnership, had authority to bind the firm.

THIS was an application by the trustee in bankruptcy for an order that a certain assignment of book debts was void as against him under these circumstances.

The firm of R. B. Briggs & Co. consisted of R. B. Briggs (the father) and H. R. Briggs (the son), and was constituted by articles of partnership dated June 12, 1903. The business of the firm was that of cork retailers, and was carried on in London under the style of R. B. Briggs & Co., the father travelling and collecting orders and book debts, and the son attending to the buying of goods and the correspondence in London. There was no clause in the partnership articles prohibiting the son from signing the firm name or signing on behalf of the firm.

On August 5, 1905, the firm were indebted to a Mr. Torna-bells in the sum of 682*l.* 12*s.* 6*d.* for goods supplied, and he

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through his solicitor, Mr. Williams, wrote the firm pressing for payment of or security for that sum. Negotiations then ensued between Mr. Williams and H. R. Briggs (the son), and the latter agreed that his firm would execute an assignment by deed of their book debts to Mr. Tornabells as security for his debts. The deed was prepared by Mr. Williams, and was expressed to be made between "R. B. Briggs and H. R. Briggs, carrying on business as cork retailers under the style or firm of R. B. Briggs & Co. at 9, St. George Street in the county of London," and thereafter called "the assignors" of the one part and Mr. Tornabells, thereafter called "the assignee," of the other part, and thereby, after reciting that the assignors were indebted to the assignee in the sum of 682*l.* 12*s.* 6*d.*, the assignors as beneficial owners assigned the book debts specified in the schedule thereto to the assignee absolutely upon trust to collect and apply the moneys received in payment of the 682*l.* 12*s.* 6*d.* with interest thereon. On August 15, Mr. Williams sent the engrossment of the deed by post to the firm, requesting that it should be executed by both the partners, and on August 21 the deed, bearing date August 19, and purporting to be executed by the father and son in their individual names, was handed by the son to Mr. Williams, who took it in good faith. On September 7, Mr. Tornabells, not being satisfied with the way matters were going, gave notice of the deed of assignment to the scheduled debtors. On September 28, a receiving order was made against the firm on an act of bankruptcy committed on September 21; adjudication followed, and Mr. Wright became the trustee in bankruptcy. It then transpired that the father's signature to the deed of assignment was a forgery by the son, who had absconded. The trustee in bankruptcy now claimed a declaration that the deed of assignment was void as against him on the ground (1.) that it did not bind the firm; and (2.) alternatively, that it was a fraudulent preference and an act of bankruptcy (but this point does not call for a report). There was evidence that the father never knew of the deed until September 16, and had never consented to any assignment of the book debts of the firm. It also appeared that the firm was wholly insolvent, and that there would be no

surplus from the son's separate estate and only a small surplus from the father's separate estate.

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*A. F. Wootten*, for the trustee. The deed is a nullity. There is no evidence that when the son signed he intended to sign as agent for the firm. The deed was sent to have the individual signature of each partner; that negatives the presumption that the son signed as agent.

*Tindale Davis*, for the respondent. Under the general law of partnership the son had authority to sign the firm name, and, although the deed may not be binding as a deed, it is a good equitable assignment of the book debts under s. 25 of the Judicature Act, 1873, and was perfected by notice: *Marchant v. Morton, Down & Co.* (1) The son signed as a partner, and therefore the presumption is that he signed on behalf of the firm. It was an act done in relation to the business of the firm and with the intention of binding the firm within s. 6 of the Partnership Act, 1890, and the signature of the father is surplusage.

*A. F. Wootten*, in reply. The case cited does not apply. There the signature was in the firm name. Here it is the individual signature of one partner, and, it is submitted, was intended for his signature only.

BIGHAM J. I am against the trustee on this point. It appears that the father and the son carried on business together, the son attending to the financial part of the business and the father travelling and paying little attention to the work that had to be done in the office. In August, 1905, the present respondent Tornabells was pressing the firm for payment of a considerable debt, and the money was not forthcoming. Thereupon he asked for and obtained what he conceived to be an assignment of a number of book debts which were then due to the firm. The assignment was drawn up by a solicitor, and purports to be by deed. It is an indenture made August 19, 1905, between Robert Blakewell Briggs, the father, and Herbert Robert Briggs, the son, carrying on business as cork retailers under the style or firm of R. B. Briggs & Co. of the one part, and Francisco Tornabells of the other part. The deed purports to assign the



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book debts contained in the schedule as security for the payment of the debt due by the firm to Tornabells. This deed was executed by the son. The son being a partner, had, in my opinion, for the purposes of the business authority as between himself and his father to deal with the book debts for partnership purposes—that is to say, he had authority to assign the book debts to secure or to pay any one of the creditors of the firm. He had authority, therefore, to do that which he was purporting to do by this deed, and he had authority to do it so as to bind the firm. He executed this deed. His father never executed it, and I believe what the father tells me when he says that he knew nothing at all about it. The son appears to have written the father's name at the bottom, so that the deed on its face appears to have been executed by both. The only question I have to determine is, whether this document operates as an assignment by the firm of the firm's book debts. Now I have said it was executed by a person who had the firm's authority to assign the book debts—one of the partners—and, whether it is valid or not as a deed, it is in my opinion a good equitable assignment by the firm of the debts contained in the schedule. Sect. 6 of the Partnership Act, 1890, provides that: "An act or instrument relating to the business of the firm, and done or executed in the firm-name, or in any other manner shewing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners." I have read all the words of the section which are applicable to this case. This is, in my opinion, an act or instrument relating to the business of the firm. It is done or executed in a manner shewing an intention to bind the firm, and it is done or executed by a person thereto authorized—that is to say, by a partner who by reason of the partnership had authority to do an act of this kind—and therefore it is in my opinion, within the section of the Act, binding on the firm and all the partners. [The learned judge then dealt with the question of fraudulent preference, and held on the evidence that this contention of the trustee also failed.]

Solicitors: *Irvine, Borrowman & Browne; M. E. Williams & Co.*

H. L. F.

*In re* GARNER.*Ex parte* PEDLEY.

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*May* 28.

*Bankruptcy—Practice—Taxation—Solicitor's Bill of Costs—Conveyancing Business—Duty of Taxing Officer—Solicitors' Remuneration Act, 1881 (44 & 45 Vict. c. 44), General Order, Sched. I.—Bankruptcy Rules, 1886, Appendix, Part II. (Scale of Costs), General Regulations, r. 2.*

It is no part of the duty of the taxing Master in bankruptcy when taxing a solicitor's bill of costs in respect of conveyancing business under r. 2 of the General Regulations in Part II. (Scale of Costs) of the Appendix to the Bankruptcy Rules, 1886, to consider or decide out of what funds the bill when taxed is to be paid. His duty is merely to tax the bill in accordance with the General Order under the Solicitors' Remuneration Act, 1881; but his allocatur should state that the amount of the bill as taxed and allowed is to be paid in accordance with r. 2 of the above General Regulations, leaving it to the parties to apply to the Court, if necessary, to determine the fund (if any) out of which the taxed bill is to be paid.

*Semble:* The words "proceeds of sale" in the proviso of r. 2 of the above General Regulations mean the net proceeds of sale after payment of all the charges on the fund.

THIS was an appeal from the decision of the taxing Master in bankruptcy under these circumstances:—

The debtor was adjudicated bankrupt in the county court at Crewe, and at the time of his bankruptcy was the owner of a number of different properties of an estimated total value of about 14,000*l.* Each of the properties was separately subject to a first mortgage, and all of them were also included in and subject to one second mortgage. The debtor's statement of affairs shewed a surplus value of the properties, over and above both the first mortgages and the second mortgage, of about 3000*l.* The trustee in bankruptcy sold three of the properties separately for sums which paid the first mortgage on each, leaving a balance on each which was applied towards reduction of the second mortgage. In this way the greater part of the second mortgage was paid off and a small sum of 1*l.* 9*s.* 11*d.* was paid to the trustee. A Mr. Pedley, a solicitor, was employed by the trustee to carry through these sales, and his bill of costs in relation thereto was taxed by the registrar of the county court under

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the Solicitors' Remuneration Act, 1881, and allowed at 16*l.* 10*s.* This taxation at the request of the Board of Trade was reviewed by the bankruptcy taxing Master under r. 2 of the General Regulations in Part II. (Scale of Costs) of the Appendix to the Bankruptcy Rules, 1886. (1) Under this rule the bankruptcy taxing Master taxed off 15*l.* 0*s.* 1*d.* from the 16*l.* 10*s.*, thus reducing the amount to 1*l.* 9*s.* 11*d.*, on the ground that the solicitor's percentage was only payable "out of the proceeds of sale," and that as the proceeds of sale, so far as the trustee was concerned, amounted only to 1*l.* 9*s.* 11*d.*, he (the taxing Master) was bound to reduce the 16*l.* 10*s.* to 1*l.* 9*s.* 11*d.* by taxing off the sum of 15*l.* 0*s.* 1*d.* Mr. Pedley appealed against this decision.

The trustee had ample assets of the bankrupt other than the particular properties comprised in the above-mentioned mortgages.

*T. Hughes, K.C.*, and *J. H. Redman*, for the appellant. There are three objections to the taxing Master's decision: First, the taxing Master has nothing whatever to do with the question whether there are or are not any "proceeds of sale" out of which the bill when taxed will be paid. His function is only to tax. Secondly, the words "proceeds of sale" mean the ultimate surplus after all the properties have been sold and all the mortgages have been paid off. There is no direct decision on the point, but the words were considered by Cave J. in the case of *In re Gallard*. (2) Thirdly, the proviso in r. 2 is *ultra vires*.

[BIGHAM J. I had better consider each objection separately,

(1) Rule 2 of the General Regulations in Part II. (Scale of Costs) of the Appendix to the Bankruptcy Rules, 1886, provides: "In respect of business connected with sales, purchases, leases, mortgages, and other matters of conveyancing . . . the solicitor's remuneration shall (in the absence of any agreement to the contrary) be regulated by the General Order under the Solicitors' Remuneration Act, 1881, for the time being in

force; provided that, in cases of sales of mortgaged properties, the trustee's solicitor, if his remuneration shall be under Schedule I. of the existing Order, shall only be entitled to percentage upon so much of the proceeds of sale as shall not be chargeable by the mortgagee's solicitor with the percentage, and such percentage shall be payable only out of the proceeds of sale."

(2) (1888) 21 Q. B. D. 38, 41.

and if I am in your favour on the first it will not be necessary to decide the other two.]

The appellant's contention is that the reference in r. 2 as to the fund out of which the amount of the bill as taxed is to be paid is not a matter with which the taxing Master has any concern or jurisdiction. His duty is to fix the proper charges for the services performed, and it is for the trustee in bankruptcy to consider whether he has any funds out of which the taxed costs can be paid. Here the proper amount under the Solicitors' Remuneration Act, 1881, is 16*l.* 10*s.*

*Hansell*, for the Board of Trade. Sect. 73 of the Bankruptcy Act, 1883, and rr. 112-115 of the Bankruptcy Rules, 1886, shew that the whole object of the bankruptcy taxation is to fix the amount payable out of the bankrupt's estate; so that taxation is for the purpose of ascertaining the allowance. Then the taxing Master in his allocatur (Form 141) certifies that he has taxed the bill of costs and has "allowed the same at the sum of £     " and then the bill of costs is brought in to be paid out of the bankrupt's estate. The word "allowed" means allowed out of the bankrupt's estate. If the full amount of the percentage is allowed, the solicitor can get payment out of the bankrupt's estate, but here the allowance is governed by r. 2, to which the taxing Master must have regard, and which cuts down the amount to the net proceeds of sale. But if the proviso in the rule is to be ignored, the result will be that the taxing Master must in every case grant his allocatur for an amount which may in many cases more than exhaust the proceeds of sale that come into the bankrupt's estate.

BIGHAM J. I think the duty of the taxing Master is to tax the bill in accordance with the Solicitors' Remuneration Act, 1881, and for that purpose to have regard to the schedule to that Act in order to see what the percentage is to which the solicitor is entitled. But I think it is no part of his duty to inquire whether or not there is a fund under the General Regulations that have been referred to out of which the amount of the taxed bill can be paid. That is not his business. Then, having taxed the bill in that way, I think that his certificate or allocatur

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ought to state that the amount is only to be paid in accordance with the proviso in r. 2 of the General Regulations, leaving the parties to ascertain whether there are any "proceeds of sale" within the meaning of that proviso out of which the amount of the taxed bill is payable, and if the parties cannot agree between themselves as to whether there is a fund within the meaning of that proviso, then they must come to the Court to determine the question. The duty of the taxing Master, as I have said, is merely to tax the bill in the ordinary way under the Solicitors' Remuneration Act, 1881, but if his allocatur simply goes in the ordinary form, "I hereby certify that I have taxed the bill of costs of Mr. C. D. and have allowed the same at the sum of £       ," it might be considered that the amount was to be paid out of the general estate of the bankrupt, whereas the proviso in r. 2 states that it is only to be paid out of the proceeds of sale. I suggest, therefore, that the allocatur should go on to state that "the amount is to be paid in accordance with r. 2 of the General Regulations in Part II. of the Appendix to the Bankruptcy Rules, 1886." This decides the first point in favour of Mr. Hughes. I do not think it is necessary at present to decide the second point, but in my opinion, having regard to the dictum of Cave J. in *In re Gallard* (1), I think the words "proceeds of sale" in the proviso of r. 2 mean what is left after paying all the charges on the fund.

Solicitors: *Woosnam & Smith, for C. H. Pedley, Crewe; the Solicitor to the Board of Trade.*

(1) 21 Q. B. D. 38, 41.

[IN THE COURT OF APPEAL.]

JAMES NELSON & SONS, LIMITED *v.* NELSON LINE  
(LIVERPOOL), LIMITED.

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June 12.

*Practice—Discovery—Production of Documents—Action for Breach of Warranty of Seaworthiness—Underwriters—Subrogation—Report made to Underwriters—Nominal Plaintiffs.*

Cargo owners sued shipowners for alleged breach of a warranty of seaworthiness contained in a bill of lading, by which the cargo was lost. The plaintiffs were insured to the extent of three-fourths of the loss, and, after the commencement of the action, the underwriters paid to the plaintiffs the amount so insured, and the action was thenceforward conducted by their solicitors. The underwriters had, during the loading of the ship, procured an inspection of her condition by a surveyor, who had made a report to them thereon, which was in the possession of their solicitors. The defendants claimed discovery of this document, and applied for a stay of the action until it should be produced:—

*Held*, that they were not entitled to such discovery.

*Willis & Co. v. Baddeley*, [1892] 2 Q. B. 324, distinguished.

APPEAL from the refusal of Bigham J. to order discovery as after mentioned.

The action was by cargo owners against shipowners for alleged breach of a warranty of seaworthiness contained in a bill of lading, by reason of which the cargo, which consisted of meat, was rendered unfit for sale. The plaintiffs were insured with underwriters to the extent of three-fourths of the loss, and were uninsured as to the rest. At the time when the action was commenced the underwriters were disputing liability on the policy, but they subsequently admitted liability, and paid the amount for which they had underwritten the same. The action was thenceforward conducted by solicitors employed by the underwriters. It appeared that, while the ship was in the course of loading the cargo at Buenos Ayres, the underwriters had, through the Salvage Association, employed a surveyor to inspect her condition as regards her refrigerating machinery, and report thereon, and that he had done so, his report being in the possession of the solicitors and held by them on behalf of the underwriters. By the terms of the contract between the

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*Danckwerts, K.C., and Bailhache*, for the defendants. The defendants are entitled to discovery of the documents in question, and the mere fact that, in point of form, the underwriters are not the plaintiffs on the record does not prevent the Court from enforcing such discovery. It was held in *Willis & Co. v. Baddeley* (1), that, where the plaintiffs on the record were merely nominal plaintiffs, the persons really interested in the action, for whom they were acting as agents, being resident abroad, the Court would stay the action until the real plaintiffs made discovery of documents to the same extent as they could have been ordered to make it if they had been the plaintiffs on the record. The principle of that case is applicable to the present. The underwriters are the parties mainly interested in the action, and it is really being conducted by the solicitors on the record in the capacity of their solicitors. Their solicitors will receive any amount which may be recovered in the action, and divide the same between their employers, the underwriters, and the plaintiffs on the record. It is submitted that, under the circumstances, the underwriters are really and substantially the parties suing, though, as to one-fourth of the proceeds, they will no doubt be trustees for the plaintiffs on the record, and the plaintiffs are, therefore, only nominal plaintiffs. As surveyor for the underwriters, the surveyor who made the inspection at Buenos Ayres would have had

(1) [1892] 2 Q. B. 324.

no right to come on board the ship, and the survey presumably was allowed by the shipowners to be made on the footing that it was an exercise of the right given to the plaintiffs by the contract. If this had been a survey made by an agent for the plaintiffs, there is no doubt that the defendants would have been entitled to discovery of the surveyor's report. It was no doubt assumed by the shipowners that the survey was made on behalf of the plaintiffs. If the defendants had an opportunity of seeing this report, they might obtain information which would satisfy them that nothing was to be gained by defending the action any further, and so unnecessary litigation and expense might be avoided. It is submitted that it is only in accordance with the requirements of justice that they should have inspection of the document, and not be driven to incur expense which such inspection might shew to be useless. The Court in such a case will enforce the requirements of justice by staying the action until the document is produced. [They also cited *Republic of Liberia v. Roye* (1); *Republic of Costa Rica v. Erlanger* (2); *Kearsley v. Philips* (3); *West of England and South Wales District Bank v. Canton Insurance Co.* (4); *Wilson v. Raffalovich.* (5)]

*Rufus Isaacs, K.C.*, and *F. D. Mackinnon*, for the plaintiffs. An order such as is asked for by the defendants would go beyond anything for which the authorities afford a precedent. In *Willis & Co. v. Baddeley* (6) the plaintiffs were nominal plaintiffs; they had no interest in the action, and were merely suing as the representatives of their principals abroad. It is impossible in the present case to say that the plaintiffs on the record are merely nominal plaintiffs. They were solely interested in the action when it was commenced, and as regards one-fourth of the amount sought to be recovered they continue so interested. As between themselves and the defendants they are interested to the whole amount, and, though the underwriters are indirectly interested by way of subrogation, there is nothing in the nature of an assignment of the cause of action. It has been doubted

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(1) (1876) 1 App. Cas. 139.

(4) (1877) 2 Ex. D. 472.

(2) (1874) L. R. 19 Eq. 33.

(5) (1881) 7 Q. B. D. 553.

(3) (1883) 10 Q. B. D. 465.

(6) [1892] 2 Q. B. 324.



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whether there can, under the Judicature Act, be an assignment of part of a debt: see *Durham Brothers v. Robertson*. (1) Still less could there be an assignment of part of an unliquidated claim. The application here is really altogether different from that which was made at chambers, and from that mentioned in the notice of appeal, which is that the plaintiffs should give a further and better list of documents in their possession. It is now sought to apply the procedure indicated in the case of *Republic of Liberia v. Roye*. (2) That was a case in which, having regard to the nature of the body suing, it was impossible for the defendants to get discovery from the plaintiffs as parties in the ordinary way, and in such cases no doubt the Court has power to stay the action till such discovery as may be ordered is made. But that case has no application to the present. Authorities with regard to discovery of ship's papers and such documents in actions on policies of marine insurance have no bearing on the question in the present case; for the doctrine as to the obligation thrown on the assured in such cases is peculiar to marine insurance. There must have been thousands of cases in which underwriters have been subrogated to the rights of the assured, and yet there is no precedent for an order to compel an underwriter to give discovery of documents in his possession as if he were the plaintiff on the record in an action against shipowners. *Willis & Co. v. Baddeley* (3) was in fact an action on a policy of marine insurance, though no doubt Lord Esher did not confine what he said to cases of insurance. The document of which discovery is required did not come into existence by procurement of the plaintiffs. They have no knowledge of it, and it has never been in their possession. The persons in whose possession it is hold it, not as solicitors for the plaintiffs, but in their capacity of solicitors to the underwriters. The fact that the action is now being conducted by the solicitors of the underwriters does not make their possession of the document the possession of the plaintiffs on the record. The position is totally different from that which exists in the case of an action on a policy of marine insurance. The obligation imposed on the

(1) [1898] 1 Q. B. 765.

(2) 1 App. Cas. 139.

(3) [1892] 2 Q. B. 324.

assured in such cases depends on the fact that the underwriter knows, and can know, nothing about the facts as regards the ship's condition and the incidents of the loss. In the present case the relevance of the document is as shewing the condition of the defendants' own ship, a matter which must be within their own knowledge. [They also cited *Harding v. Bussell*. (1)]

*Danckwerts, K.C.*, for the defendants, in reply cited *Hadley v. McDougall*. (2)

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COLLINS M.R. This is an appeal from a decision of Bigham J., refusing an order for discovery of a certain class of documents, of which one has been taken as typical of the whole class. The action is by cargo owners against shipowners, claiming damages for injury to cargo in the course of the transit. The cargo owners were insured with underwriters, not to the full value, but to a very large proportion of the value, of the cargo. When the action was commenced, the underwriters had not admitted liability to the plaintiffs, but about a fortnight later they came to terms with the plaintiffs as to the amount of the loss, and paid the proportion due from them on the policy on that basis. Therefore, as things stand now, the plaintiffs have received an indemnity from the underwriters to the extent of three-fourths of the loss, and remain their own insurers as to the residue, and they are entitled in the action as against the defendants, if successful, to recover the whole of the loss. It appears that, during the process of loading the cargo, something put the underwriters or their agents on inquiry, and they caused an inspection and report to be made by an expert as to the condition of the refrigerating machinery on board the ship, which formed a most essential portion of her equipment as regards a cargo consisting of meat, as the cargo did in this case. The question now is whether, the action having, as I have said, been brought in the first instance by the cargo owners, and being now conducted by the solicitors to the underwriters, who have settled with the plaintiffs in respect of the loss to the extent which I have mentioned, the defendants are entitled to have included in the affidavit of documents to be made by the plaintiffs the

(1) [1905] 2 K. B. 83.

(2) (1872) L. R. 7 Ch. 312.

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particular document which came into existence as I have described, and is now in the custody of the solicitors who are conducting the action in the capacity of solicitors to the underwriters, at whose instance, through the medium of the Salvage Association, the document in question was brought into existence. It was said by the defendants' counsel that, whoever in point of form may be the plaintiffs in the action, the underwriters are interested in it to the extent of three-fourths of the amount recoverable, while the plaintiffs are only interested to the extent of one-fourth; and it was contended in substance that, under the circumstances, the underwriters, having substituted their solicitors for those of the plaintiffs for the purposes of the action, must be regarded as the effective plaintiffs, and ought to be treated as such and made to give discovery as if they were the plaintiffs on the record. The question is whether the rules as to discovery, as interpreted by decided cases, entitle the Court to make the order applied for by the defendants. Bigham J., whose experience in questions of this kind yields to that of no other member of the Bench, declined to make the order, presumably on the ground that there was no authority for such an order. We are not, as it seems to me, at large to do abstract justice in the matter, but are limited by the express provisions of the rules on the subject. The whole matter of discovery has been the subject of special legislation, and we must look to that legislation, as interpreted by the cases, to see whether we are not really being invited by the defendants' counsel to take a step beyond anything which has heretofore been regarded as covered by the enactments as to discovery. I think that is what we are invited to do; and, though I sympathize to some extent with a good deal that the defendants' counsel said, I do not feel justified in taking that step into the infinite, and departing from the firm foothold afforded by the statutory enactments and decisions on the subject. It appears to me that the plaintiffs on the record have a real and substantial interest in the cause of action, and cannot correctly be described as merely nominal plaintiffs. The way in which the underwriters come in is only by way of subrogation to the rights of the assured. Their right is not that of assignees of the cause

of action ; and it is admitted that the difficulties would be such that there could not be an effective assignment to the underwriters limited to their actual interest. Therefore they could only be entitled by way of subrogation to the plaintiffs' rights. What is the nature of their right by way of subrogation ? It is the right to stand in the shoes of the persons whom they have indemnified, and to put in force the right of action of those persons ; but it remains the plaintiffs' right of action, although the underwriters are entitled to deduct from any sum recovered the amount to which they have indemnified the plaintiffs, and although they may have provided the means of conducting the action to a termination. It is not a case in which one person is using the name of another merely as a nominal plaintiff for the purpose of bringing an action in which he alone is really interested ; for the plaintiffs here have a real and substantial interest of their own in the action. These facts seem to me to take the case out of those decisions by which discovery has been given as against a party not nominally a party to an action, on the ground that he really was the party to the action. The rules with regard to discovery proceed on the basis that the right to discovery is as against a party to an action, and *prima facie* it would be an answer to an application for discovery that the person against whom it was sought was not a party. Within certain limits ascertained by the decisions this right has been extended as against a person who, though in truth and in substance he is the party to the action, is not so in form ; but it does not appear to me that those decisions apply to the case of underwriters who, under such circumstances as exist in the present case, are seeking to enforce a remedy which exists directly for the benefit of the assured, though indirectly and by way of subrogation its enforcement may benefit the underwriters. None of the authorities cited on the subject of discovery appear to me to establish the contention for the defendants. The authority which goes farthest in that direction is *Willis & Co. v. Baddeley*. (1) When that case is closely scrutinized, it clearly appears to be distinguishable. The decision there, to begin with, was, I think, largely influenced by, if not actually based upon, the larger right to

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discovery which exists, in the case of an action on a policy of insurance, in favour of underwriters as against those insured. This is the case of ordinary discovery in an action by cargo owners against shipowners for breach of the warranty of seaworthiness, and it is only incidentally that any question of insurance is involved. In *Willis & Co. v. Baddeley* (1) persons abroad had effected an insurance through the plaintiffs, acting as their agents, who, as between themselves and the defendants, contracted as principals; but, though that was so, they were really only acting as a conduit pipe, with no independent right of their own, for the purpose of putting in suit the remedy of the real plaintiffs abroad. The defendants claimed discovery of documents not in their possession, but in that of their principals abroad or their solicitors. The Court were of opinion that, under those circumstances, there being no shadow of interest in the plaintiffs on the record, the persons who were really and in substance the plaintiffs should be ordered to give discovery. That case does not nearly go the length of deciding that the relief asked for in the present case can be given. It is impossible to regard the plaintiffs on the record here as not being plaintiffs in the full sense of the term, or the underwriters as being the real plaintiffs. The underwriters are in this case obliged to rely on the right of other parties, who have an independent, substantial, existing right, and the only way in which they can obtain a remedy is by putting in suit the right of those parties. It is only as against parties to the action that, generally speaking, discovery can be ordered, and I think that under the circumstances of this case the underwriters cannot be regarded as the plaintiffs in the action for the present purpose. For these reasons I think that the appeal must be dismissed.

COZENS-HARDY L.J. I am of the same opinion. It is worthy of observation that the notice of appeal in the present case does not raise the question which has been argued before us. It simply asks for an order that the plaintiffs may give a further and better list of documents; but the case has been argued here on an entirely different ground, namely, that, though the defendants

(1) [1892] 2 Q. B. 324.

are not entitled to ask for such an order as they asked for at chambers, they are entitled to ask to have the action stayed, unless the underwriters, who are only partially interested in the cause of action, produce a document as to which the plaintiffs swear that they have not, and never had, it in their possession, a statement which must be taken to be true. I think that the application now made by the defendants is an entirely novel experiment, for which there is no precedent. In cases relating to the discovery of documents one naturally goes back to the old practice in the Court of Chancery; but, notwithstanding the researches of the defendants' counsel, they have not been able to find a trace of any such order as is here asked for having ever been made by that Court in dealing with matters of this kind. I certainly think that it would be dangerous for us to make such a new departure as we are invited in this case to make. I desire to retain an open mind as to what might be the result if the underwriters had paid the whole of the loss sustained by the plaintiffs, and not merely 75 per cent. of that loss. In the present case the plaintiffs were undoubtedly the persons originally interested in the cause of action, and, for the reasons given by the Master of the Rolls, I think that they are still real plaintiffs, having as they have a substantial interest, and none the less so because the underwriters, by way of subrogation, may be entitled to 75 per cent. of the money which may be recovered in the action. I am not clear that the underwriters could in any case, either by virtue of the doctrine of subrogation or otherwise, have maintained the action in their own name. The case is not one, apparently, in which there could have been an assignment under the Judicature Act, and, speaking for myself, as at present advised, I feel disposed to agree with the view suggested by Chitty L.J. in *Durham Brothers v. Robertson* (1), to the effect that there cannot be an assignment of part of a debt under that Act. That difficulty would, a fortiori, apply to the case of an assignment of part of a right of action for an unascertained amount. The right of the underwriters in the present case cannot be put upon any assignment of the cause of action. They can only claim by virtue of the doctrine of subrogation. But

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that doctrine does not appear to me to suffice for the purpose of making out that they are the real plaintiffs in the action, at any rate in a case where the original plaintiffs retain a substantial interest.

FARWELL L.J. If this appeal succeeded, the effect would be, so far as my experience goes, to revolutionize the practice as to discovery. This is an action by cargo owners against ship-owners for breach of a warranty of seaworthiness, not an action upon a policy of marine insurance, which latter action stands on a footing peculiar to itself as regards discovery; and therefore the authorities on that class of actions have no application in the present case. The proposition put forward by the defendants' counsel is so widespreading that it would practically amount to giving the judge at chambers a power of dispensing with any limitations imposed by the rules as to discovery, wherever he thought injustice would be done unless such a power were exercised. There is no such power either in the Court below or in this Court. Discovery is an old head of equity jurisdiction, but the Court of Chancery granted that relief only within fixed limits and according to well-defined rules, and these are now embodied in Order xxxi. Counsel relied on what was said by Lord Hatherley in *Republic of Liberia v. Roye* (1), but I am sure that those observations were not intended to extend beyond the circumstances of the particular case. The real ground of the decision in that case is briefly put by Lord Cairns, where he said: "I hold it to be clear and well established that the Court of Chancery has, in the first place, jurisdiction to stay all proceedings in a cause until the plaintiff has made any discovery which he is called upon by the order of the Court to make." He does not say that the Court may stay an action for the purpose of enforcing any order as to discovery which it thinks fit to make, but that it may stay an action until the plaintiff has made any discovery which he is called upon by order of the Court to make, clearly implying that the order made is one which it is within the jurisdiction of the Court to make. The suggestion that the Court is bound to find some means of escaping from the

limits imposed by the terms of the rules as to discovery, so as to avoid injustice, appears to me to be answered by Cotton L.J. in *Wilson v. Raffalovich*. (1) He said: "It"—meaning the order in the Court below—"seems to have been based by the judges who gave their opinion in the Court below on this, that an injustice would be suffered by those whom they call the actual plaintiffs, unless the order which they then made was made. Now I venture to say that the use of the word 'injustice' is unfortunate; probably they meant it for hardship. No man can be said to suffer an injustice if, when he comes to sue in a Court, the rules of the Court applicable to suitors who seek to enforce their rights are enforced in his case, and the only question which I have to consider, and that I approach without any prejudice either one way or the other, is whether, according to the rules applicable to the conduct of litigation, the plaintiffs here are right and can sustain the order." Those observations apply to the present case, and neither the plaintiffs nor the defendants can be heard to say that there is any injustice in enforcing the rules of practice with regard to discovery.

The only ground on which the defendants could succeed would be by shewing that the plaintiffs on the record are merely nominal plaintiffs, in which case the Court would regard their appearance on the record as a mere device, and would interfere to prevent an abuse of its practice. That is the way in which the case was put by Lord Esher M.R. in *Willis & Co. v. Baddeley*. (2) He there said: "I am prepared to decide that, where it is made known to the Court that there is a foreign principal residing abroad, who is the real plaintiff in the action, and is only suing through his agent here, and that the agent was dealt with by the other side as agent, and not as principal, then, in order to prevent palpable injustice, the Court, by reason of its inherent jurisdiction, will insist that the real plaintiff shall do all that he ought to do for the purposes of justice, as if his name were on the record. It is true that the Court cannot make an order on him such as is here asked for, because he is not a party to the action: but it can say that the nominal party shall not proceed with the action, till the

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(1) 7 Q. B. D. 553, at p. 560.

(2) [1892] 2 Q. B. 324.



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real plaintiff has done that which, had he been a party to the action, he might have been ordered to do." A. L. Smith L.J. said: "It seems to me that the principle inherent to the jurisdiction of every Court as regards this practice is that it should be framed so as to do justice, and that, if we did not stay this action until the discovery sought is made, as the action is brought by a nominal plaintiff for and on behalf of and as agent for the Trieste Company, we should be doing that which is not justice between the parties." A person cannot by putting forward another person as a mere shadow to cover his own identity for the purposes of litigation escape from liabilities to which he would have been subject if he had been a party on the record. The only ground put forward for the suggestion that the plaintiffs were mere nominal plaintiffs in this action appears to be that the solicitors for the underwriters were allowed by them to continue the conduct of the action, but this is a wholly inadequate ground for the suggestion. The principle acted on in *Willis & Co. v. Baddeley* (1) seems to me similar to that on which an insolvent nominal plaintiff is ordered to give security for costs in a Court of first instance, as mentioned in *Cowell v. Taylor*. (2) If the defendants had succeeded in shewing that the plaintiffs in this action were *nominis umbra*, the case might have been different, but as they have failed to do so, I do not see how we can go beyond the terms of the rules which limit discovery to the documents in the possession of a party.

*Appeal dismissed.*

Solicitors for plaintiffs: *Parker, Garrett & Co.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

(1) [1892] 2 Q. B. 324.

(2) (1885) 31 Ch. D. 34.

[IN THE COURT OF APPEAL.]

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## SMITH AND OTHERS v. JUSTICES OF PORTSMOUTH.

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*Licensing Acts—Order for Alteration in Premises—Direction to keep Door locked—Structural Alteration—Licensing Act, 1902 (2 Edw. 7, c. 28), s. 11, sub-s. 4.*

Where licensed premises had doors giving access respectively from different streets to a part of the premises where intoxicating liquor was sold, and licensing justices, intending to act under the Licensing Act, 1902, s. 11, sub-s. 4, on the renewal of the licence, made an order that one of these doors should be kept locked and not used except for domestic purposes, or for delivering intoxicating liquor, coals, or other goods, when necessary, or for the private use of the licensee, or his household, or bona fide lodgers on the premises, and that the key of the door should be kept by the licensee:—

*Held*, that the Licensing Act, 1902, s. 11, sub-s. 4, refers only to structural alterations, and therefore did not authorize the justices to make the before-mentioned order.

*Bushell v. Hammond*, [1904] 2 K. B. 563, distinguished.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J., Ridley J., and Darling J.) on a case stated by the Recorder of Portsmouth, on an appeal by the licensed occupier and the owners of a public-house in Portsea from an order made by the licensing justices of Portsmouth. The facts stated in the special case were, in substance, as follows:—

The appellant Smith was the holder of a full licence at a public-house in Portsea, called the Naval Hotel, and in accordance with a notice served upon him in that behalf he deposited with the clerk to the justices, on applying for a renewal of his licence, a plan of the licensed premises, shewing the whole of the said premises included in the licence, and distinguishing the rooms or parts of the premises used for the sale or consumption of intoxicating liquor, and also shewing the several entrances to the premises from two parallel streets known as Wickham Street and Havant Street respectively, with the dimensions and description of each room and the position of every counter, screen, and partition. The plan shewed that the premises had bars and bottle and jug entrances in two distinct parallel streets—Wickham Street and Havant Street. The premises were 136 feet

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The recorder held that s. 11, sub-s. 4, only conferred on the justices power to order alterations in the licensed premises and alterations of a structural character, and that, while the part of the order as to nailing up one door might be within the section, the rest of the order was not, as it did not purport to order structural alterations or any alterations in the premises at all, and that the latter part of the order was, therefore, *ultra vires*, and he quashed the whole order, as in his judgment the first part by itself was unnecessary and useless. The question for the High Court was whether the justices had jurisdiction to make the order.

The Divisional Court were of opinion that the justices had jurisdiction to make the order, and they accordingly reversed the decision of the recorder.

*Pickford, K.C.*, and *S. H. Emanuel* (*H. Brodrick* with them) for the appellants. An order to keep a door locked except for certain purposes cannot be said to be an order for structural

alterations. The alterations contemplated by s. 11 of the Act are alterations of a permanent character, such as can be indicated on a plan: see sub-ss. 2 and 4, which must be read together. If this were an order for alterations, it would follow that, whenever the licensee locked the door in the passage from that part of the premises facing Havant Street in which intoxicating liquors are sold to the part of the house used for domestic purposes, without the leave of the justices, he would be in danger of forfeiting his licence under sub-s. 2, because so doing affects the communication between those parts. By sub-s. 5 notice of the order for alteration is to be given to the owner of the premises by the clerk to the justices; it could hardly have been intended that notice should be given to the owner of a mere intention of the licensee to keep such a door locked at certain times. By sub-s. 4, if the licensee makes default in complying with an order for alterations, he is liable to a fine for every day during which the default continues. That must refer to an order default in compliance with which is continuous, not to a series of disconnected omissions from time to time. The alterations contemplated by s. 11 must consist of some permanent addition to or subtraction from the structure of the premises. In the King's Bench Division Lord Alverstone C.J. and Ridley J. relied upon *Bushell v. Hammond* (1) as an authority that an order to keep a gate locked is an order for an alteration within the meaning of sub-s. 4. But in that case the point was not taken that merely keeping a gate locked is not an alteration within that sub-section; and deliberately not taken, because, if the appellant in that case, i.e., the licensee, had taken it, he would have been ordered at the next licensing meeting to replace the gate by a permanent brick wall closing up the passage. The order as made was greatly in his favour. As pointed out by Collins M.R. (2), the justices made an order involving the least possible disturbance to the premises and inconvenience to the licensee; they ordered him to keep the gate locked and to leave the key in the custody of a member of his family, instead of requiring more drastic alterations to be made in the premises at considerable expense to the licensee. That case is no authority for holding that keeping a door locked is an alteration.

(1) [1904] 2 K. B. 563.

(2) Ibid. 566.

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Moreover, the order in that case was that the back entrance to the premises should be closed by an iron gate, which should be kept locked and should be opened only at necessary times for the delivery of beer, &c., and therefore involved the erection of an iron gate, which would be a structural alteration.

Again, the Lord Chief Justice draws a distinction between alterations in the earlier part of sub-s. 4, i.e., "alterations . . . necessary to secure the proper conduct of the business" and the "structural alteration" mentioned in the later part; but the distinction is not a sound one, because the alterations necessary to secure the proper conduct of the business are alterations to be "made in that part of the premises where intoxicating liquor is sold or consumed"; that is to say, alterations made in the structure of that part of the premises, and therefore structural alterations.

If this is held to be a structural alteration the effect will be to add another to the four grounds on which alone justices may refuse a renewal by virtue of s. 1 of the Licensing Act, 1904.

*Avory, K.C.*, and *Tyrrell Giles*, for the respondents. It is not contended that *Bushell v. Hammond* (1) is an authority for the abstract proposition that the alterations contemplated by s. 11 must not or need not be structural. The question was not argued in that case. But it is an authority that sub-ss. 2 and 4 of s. 11 are to be read together; and, reading them together, it is clear that the alterations contemplated by the Legislature are such as affect facilities for drinking, or the secrecy of any part of the premises used for drinking, or the communication between that part of the premises where intoxicating liquor is sold and any other part of the premises, or any street, or other public way. Alterations of that kind, when necessary to secure the proper conduct of the business, are alterations within the meaning of s. 11, and may be ordered by the justices. It is submitted that, upon the true construction of s. 11, sub-s. 4, either its operation is not confined to structural alterations, or, if it is, the term "structural alterations" in a licensing Act is not to be understood in that strict or limited sense which it would have in a real property Act. The most important part of

(1) [1904] 2 K. B. 563.

the structure of a public-house is its access from the street. The principal matters which licensing justices have to consider are the number of entrances to the public-house, from what streets it is entered, and whether one entrance must be closed and another may be left open. Therefore keeping closed a door which gives access to a particular street may well be a structural alteration in a public-house; in practice it makes no difference whether the door is ordered to be locked, bolted, or screwed or nailed up, or whether, instead of a door, a brick wall is built across the passage from one part of the house to another. The use of the expression "a structural alteration," when it occurs in sub-a. 4, does not shew that the whole of the alterations contemplated by the sub-section are structural, but the contrary. That part of the sub-section really makes a special provision for cases in which the alterations ordered are structural, thus shewing that other kinds of alteration are contemplated by the Act.

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*Pickford, K.C., in reply, cited Rex v. Dodds. (1)*

COLLINS M.R. This is an appeal from the judgment of a Divisional Court, overruling the decision of the Recorder of Portsmouth on an appeal from licensing justices. The question raised, which turns on the Licensing Act, 1902, is whether the justices had jurisdiction to make the order which they made upon an application for a renewal of the licence of certain licensed premises. It appeared that the premises had frontages on two parallel streets, one called Wickham Street and the other Havant Street, and there were means of access to them from both those streets. The justices, purporting to act under s. 11, sub-a. 4, of the Licensing Act, 1902, ordered that the entrance to the jug and bottle department in Havant Street should be nailed up, and the entrance door to the public bar of the premises in the same street should be kept locked, and that it should not be used except for domestic purposes, or for delivering intoxicating liquor, coals, or other goods, when necessary, or for the private use of the licensee, or his household or lodgers, and therefore should not be used by customers. So far as this

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last-mentioned entrance, therefore, is concerned, there is no order for any physical alteration in the premises; there is merely a mandate imposed on the licensee to act in a particular way, namely, only to use the entrance at certain times and for certain purposes. One of the two entrances in Havant Street, namely, the entrance to the jug and bottle department, is to be physically blocked, but as to the other, the entrance to the bar, there is merely a moral obligation imposed on the person who holds the licence, the result being that, as long as he conforms to the directions of the licensing justices, the door will at certain times of the day be closed and at other times open. The point taken before the recorder was that, though under the section the justices had power to order structural alterations in the premises, they had no power to dictate to the person licensed the conditions according to which he must carry on his business. The recorder seems to have thought that, as regards the door ordered to be nailed up, the order might possibly have been valid if that had stood alone, but, as to the door which gave access to the bar, the order, which merely imposed a moral restriction on the licensed person with regard to the mode of using the premises, could not be said to be an order for an alteration of the premises within the meaning of the section. His decision in that respect was challenged, and on appeal the majority of the Divisional Court thought that it was wrong. I say the majority, because, though Darling J. appears, out of deference to the other members of the Court, to have concurred in their decision, his judgment seems to me to give very cogent reasons for arriving at the opposite conclusion, and to be in substance, though not in form, a dissentient judgment. I do not doubt that, as the Lord Chief Justice has said in this case, and I think in other cases, a provision enabling justices to take steps for ensuring that business in public-houses should be carried on subject to reasonable conditions might be a most salutary provision and confer a power which might with advantage be entrusted to licensing justices; but the question is whether such a power has been entrusted to them by the Legislature. In dealing with the question in this case, I cannot ignore the construction put on the most recent licensing Act, namely, the

Licensing Act, 1904, though the Act with which we are dealing was antecedent to that Act. The Act of 1904 was one in which a policy which had been for some time coming into favour was embodied, and by which the statutory powers given to justices with regard to the renewal of licences were formed into a code. The construction of that Act came before this Court in *Rex v. Dodds* (1), and we held that the justices have no authority, under s. 9 of the Licensing Act, 1904, to make the renewal of an existing on licence conditional on the applicant giving an undertaking as to the conduct and management of the business in respect of matters not covered by the grounds for refusing the renewal of such a licence specified in s. 1 of the Act. Therefore we cannot ignore the fact that, under the latest Act on the subject, justices, in dealing with these matters, have no power to make it a condition of the renewal of a licence that the licensee should give an undertaking as to the mode in which he will conduct his business. The question here is what is the true construction of s. 11, sub-s. 4, of the Licensing Act, 1902. We must, I think, read the section as a whole, and construe each sub-section in relation to the others. It seems to me that the general purview of the section is correctly indicated by the side-note, which is "Control of justices over structure of licensed premises," as being that it deals with structural alterations of the premises. Sub-s. 1 requires a person intending to apply for a new licence for premises to deposit with the clerk to the licensing justices a plan of the premises. Sub-s. 2 provides that "any alteration in any licensed premises . . . which gives increased facilities for drinking, or conceals from observation any part of the premises used for drinking, or which affects the communication between the part of the premises where intoxicating liquor is sold and any other part of the premises, or any street or other public way, shall not be made without the consent of the licensing justices," who "may, before giving their consent, require plans of the proposed alterations to be deposited with their clerk at such time as they may determine; and, if any such alteration is made, save under the order of some lawful authority, without such consent as aforesaid, a Court of summary

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jurisdiction, on complaint, may by order declare the licence to be forfeited, or direct that, within a time fixed by the order, the premises shall be restored to their original condition." The terms of that sub-section all seem to me to point to some physical alteration of the structure. The alteration mentioned is an "alteration in any licensed premises," not "in the mode of conducting the business in licensed premises"; and the provisions with regard to deposit of a plan in sub-ss. 1, 2, and 4 seem to indicate that the alteration contemplated must be such as could appear on a plan. Again, the provision for an order that the premises shall be restored to their original condition seems to point in the same direction. How could a plan indicate such an alteration as that a door should for certain purposes be kept shut, and should only be opened for other purposes? Or how could premises be restored to their original condition where a door had to be kept open sometimes and for some purposes and closed at other times and for other purposes? Then we come to sub-s. 4, upon which this case turns. That sub-section provides that on any application for the renewal of a licence for premises "the licensing justices may require a plan of the premises to be produced before them, and to be deposited with their clerk, and, on renewing any such licence, they may by order direct that, within a time fixed by the order, such alterations as they think reasonably necessary to secure the proper conduct of the business shall be made in that part of the premises where intoxicating liquor is sold or consumed,"—not "in the mode of conducting the business in that part of the premises where intoxicating liquor is sold or consumed,"—"but any such order shall be subject to an appeal to a Court of quarter sessions, as provided by the Alehouse Act, 1828, and, if any such order for structural alteration is made and complied with, no further requisition for the structural alteration of the premises shall be made within the next five years. If the licensed person makes default in complying with any such order, he shall, on summary conviction, be liable to a fine not exceeding twenty shillings for every day during which the default continues." It seems to me that for the reasons already given all the terms of that sub-section indicate that it refers to structural alterations. I do

not read the word “ structural ” in the phrase “ structural alteration ” in the latter part of the sub-section as introducing a new idea, but as gathering up in one word that which has already been sufficiently indicated by all the provisions of the previous part of the sub-section. I do not think it possible to found upon that phrase an argument to the effect that the previous part of the sub-section cannot be confined to structural alterations. It appears to me to be even more clear with regard to sub-s. 4 than with regard to the previous sub-sections that the alterations with which it deals are structural. This view seems to me to be confirmed by sub-s. 5, which provides that “ notice of any order under this section shall be forthwith given by the clerk to the owner of the premises in respect of which the order is made.” That is, as it appears to me, a very reasonable provision to introduce where a structural alteration is ordered, but it is not so easy to see why such a notice should be given with regard to an alteration in the mode of conducting business on the licensed premises. The provision in sub-s. 4 which provides that the order shall fix a time within which the alterations are to be made also seems strongly to indicate that the alterations contemplated are structural. How could such a provision be applied in a case where the order is that a door, the physical condition of which remains unaltered, shall only be used for certain purposes and at certain periods of the day? For these reasons I think that the alterations contemplated by s. 11, sub-s. 4, of the Licensing Act, 1902, are structural, and that the justices had no jurisdiction to make the order which they made. It has been urged that the decision of this Court in *Bushell v. Hammond* (1), by which we are bound, is an authority to the contrary. But, when that case is looked at, it will be seen that it is not in truth a decision on the point raised in the present case at all. The point there raised really was that the structural alteration ordered was not a structural alteration in that part of the premises where intoxicating liquor was sold or consumed, but only in a passage leading thereto, and therefore the justices had no jurisdiction to make the order under sub-s. 4 ; and, rightly or wrongly, we held that the sub-section applied to

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an alteration in the means of access to the part of the premises where intoxicating liquor was sold or consumed. At the commencement of my judgment I said: "The point raised upon the case stated by quarter sessions is whether the licensing justices had jurisdiction to order certain structural alterations to be made in licensed premises; that question depends upon the meaning to be attached to the provisions of s. 11, sub-s. 4, of the Licensing Act, 1902." That passage appears to me to be the key to the whole judgment, which turns entirely on the assumption that the alterations ordered were structural. On a fair construction of the judgment, it is clear that the question to which it was addressed was not whether the alterations ordered were structural, but, assuming them to be structural, whether the justices had jurisdiction to order them to be made in the part of the premises where they were directed to be made. For these reasons I think the appeal must be allowed.

COZENS-HARDY L.J. I am of the same opinion. If it were not for the fact that we are differing from the Divisional Court, I should not think it necessary to add anything. The question is not whether the order made by the justices was a reasonable one to make in the public interest, but whether they had jurisdiction to make it under the Licensing Act, 1902, s. 11, sub-s. 4. Reading s. 11 as a whole, as I think it ought to be read, it does not seem to me to justify the imposition of conditions generally, as regards the mode in which business is to be carried on by the licensed person, but only as regards the making of alterations in the premises themselves. The expression "structural alteration" is used in one part of the sub-section, and I think that what the section as a whole contemplates is some physical alteration, not a mere restriction of the user of the premises by the licensee. I do not think that the construction which we were asked by the respondents' counsel to put upon the words "any such order for structural alteration" is a reasonable one. I read these words as being merely the expression of what is necessarily involved in the term "alterations," having regard to the context in the foregoing part of the section, whereas we were asked to read that part of sub-s. 4 as meaning that, if any such order for alteration

involved structural alteration, then particular provisions should apply. But that is not, in my opinion, what the sub-section says; and I think that construction would be inconsistent with the whole purview of the section. The provisions of the section with regard to the deposit of plans, and the time within which the alterations are to be carried out, seem to me to be quite inconsistent with the construction which we are asked to put upon it by the respondents, a construction which would allow the justices to impose almost any conditions which they thought fit upon the licence-holder.

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SIR GORELL BARNES, PRESIDENT. It is only because we are differing from the Court below that I desire to add a few words. We have not in this case to decide what powers it might be desirable that licensing justices should have in such cases, but what powers are actually given them by the section. Speaking in general terms, it seems to me that it could not be correctly said that the act of locking a door is really an "alteration in the premises." The language of the section, to which the Master of the Rolls has fully referred, appears to me entirely to bear out the view that what the section contemplates is some structural alteration. In particular I refer to the words which give the power to direct that the required alterations shall be made "within a time fixed by the order," and which seem inapplicable to an order for the locking of a door which may be unlocked for certain purposes. Also the last sentence of the 4th sub-section seems clearly to shew that what the justices may order is something permanent, and not something of a changing character, as that a door shall be sometimes locked and sometimes unlocked. It provides, in case of default in complying with the order of the justices, for a penalty not exceeding twenty shillings for every day during which the default continues. This provision seems to me to refer to something of a permanent character, or, in other words, to some structural alteration.

*Appeal allowed.*

Solicitors for appellants: *Speechly, Mumford & Co., for Lamport. Bassitt & Co., Southampton.*

Solicitors for respondents: *Hickson & Moir, for Fred. G. Allen, Portsmouth.*

E. L.

I



## [IN THE COURT OF APPEAL.]

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May 23, 24,  
25.GUARDIANS OF WOOLWICH UNION, APPELLANTS v.  
GUARDIANS OF FULHAM, RESPONDENTS.

*Poor Law—Settlement and Removal—Illegitimate Child—Settlement by Residence—Irremovability—Residence of Child under Sixteen with Parent—Acquisition of Settlement while under Sixteen—Divided Parishes and Poor Law Amendment Act, 1876 (39 & 40 Vict. c. 61), ss. 34, 35—Poor Removal Act, 1846 (9 & 10 Vict. c. 66), ss. 1, 3—Poor Removal Act, 1848 (11 & 12 Vict. c. 111).*

An illegitimate child can, under s. 34 of the Divided Parishes and Poor Law Amendment Act, 1876, before attaining the age of sixteen acquire a settlement by residence in a parish with its mother for the period and under the circumstances mentioned in that section.

The proviso to s. 1 of the Poor Removal Act, 1846, as amended by the Poor Removal Act, 1848, does not apply to illegitimate children.

Judgment of Divisional Court, [1905] 2 K. B. 203, reversed.

APPEAL from the judgment of a Divisional Court (Lord Alverstone C.J., Kennedy J., and Ridley J.), reported [1905] 2 K. B. 203, upon a case stated under 12 & 13 Vict. c. 45, s. 11.

The respondents had obtained an order of two justices for the county of London, whereby it was adjudged that the parish of Charlton-next-Woolwich, in the Woolwich Union, in the county of London, was the place of the last legal settlement of five children, the oldest of whom was about fourteen years of age, and who had become paupers chargeable to the parish of Fulham. The appellants gave due notice of appeal to quarter sessions against the order, and, the appeal having been entered, afterwards by consent of the parties and by order of Jelf J. a case was stated, the parties agreeing that judgment in accordance with the decision of the Court should be entered at quarter sessions, according to the provisions of the above Act. The facts stated in the case were, in substance, as follows:—

In or about the year 1880 William Turpin married Rosa Clark. In or about the year 1884 the latter left her husband and cohabited with John Johnson, by whom she had, among others, the five children in question. All the children were registered in the register of births as the children of John Johnson. The children respectively had lived with John Johnson and Rosa Turpin in the

parish of Lambeth, and the residence of John Johnson and Rosa Turpin with the children continued in that parish, without a break and without relief from the guardians, for a period exceeding three years. During the same period William Turpin resided for a term of three years and upwards in the parish of Charlton-next-Woolwich, in the Woolwich Union, in such manner and in such circumstances as made him irremovable therefrom and settled therein. In 1903 the paupers became chargeable to the parish of Fulham, having resided there not quite a year. The appellants affirmed that the five children in question acquired a legal settlement in the parish of Lambeth by reason of the residence therein of John Johnson and Rosa Turpin, or by reason of the residence therein of the five children themselves for upwards of three years prior to 1901, in such manner and in such circumstances in each of such years as would, in accordance with the statutes in that behalf, render them irremovable therefrom. The respondents affirmed that the pauper children took their mother's settlement, which was the settlement acquired by William Turpin in the above-mentioned circumstances. The question for the opinion of the Court was whether upon the facts above stated the five children were settled in Charlton-next-Woolwich, in the Woolwich Union, or not.

The Divisional Court held that the children were so settled, and therefore gave judgment for the respondents.

*Rawlinson, K.C.*, and *Cox-Sinclair*, for the appellants. The paupers acquired a settlement in the parish of Lambeth under the Divided Parishes and Poor Law Amendment Act, 1876, s. 34, by residing therein for the period of three years under such conditions in each of those years as would confer upon them the status of irremovability. Under the Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 3, "no child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or step-mother, or reputed father," is removable, where the person with whom he or she so resides is irremovable. The paupers in this case were during three years living in Lambeth with their reputed father, who was irremovable therefrom; and, the words

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of the above-mentioned section "residing with his or her father or mother, &c.," being alternative, the fact that the paupers also resided with their mother, assuming that she was not irremovable from Lambeth, does not affect the case. The decision in *West Ham Union v. Holbeach Union* (1) shews that the word "person" in s. 34 of the Divided Parishes Act, 1876, includes a child under the age of sixteen years, and that such a child can acquire a settlement by residence under that section. It will be contended for the respondents that that case is distinguishable, because there the person whose settlement was being discussed had attained the age of sixteen when her settlement came in question, and that the effect of s. 35 is that a child, while under the age of sixteen, cannot acquire a settlement for itself. That contention must, having regard to the decision in *West Ham Union v. Holbeach Union* (1), come to this, namely, that the settlement acquired by the child under s. 34 is suspended until it attains the age of sixteen. It is legally impossible to suppose that a settlement so acquired can be suspended in this manner. Under the old law an unemancipated child could always acquire a settlement, as for instance by apprenticeship, and by so doing became ipso facto emancipated. Sect. 35 of the Act of 1876 has, it is submitted, nothing to do with the question. That section relates entirely to the alteration of the law with regard to derivative settlements by the abolition of such settlements save as excepted by the section, and deals with the changes consequent thereon. It has nothing to do with the acquisition of a settlement by residence under s. 34. All the confusion that has arisen in these cases has been caused by the introduction of s. 35 into the matter on the assumption that it is intended to operate in part by way of qualification of s. 34. They also cited *Bodenham v. St. Andrew's, Worcester* (2); *Reg. v. Cudham* (3); *Reigate Union v. Croydon Union* (4); *East Retford Union v. Strand Union*. (5)

*Macmorran, K.C.*, and *S. Davey*, for the respondents. Sect. 34 of the Divided Parishes and Poor Law Amendment Act, 1876,

(1) [1903] 2 K. B. 627; [1904] 2 K. B. 121; [1905] A. C. 450.

(2) (1853) 1 E. & B. 465.

(3) (1859) 1 E. & E. 409.

(4) (1889) 14 App. Cas. 465.

(5) (1862) 3 B. & S. 122.

must be construed so as to be consistent with s. 35. The term "suspended settlement" is not really very appropriate to the present case, because a settlement cannot properly be said to be suspended when it has not yet come into existence. There is, however, some authority for the use of that term in this connection. Where a woman having a settlement married a man having none, her settlement has been said to be suspended during the coverture, and to revive again after the husband's death. Under the law as it stood before the Act of 1876, a legitimate child, until he became emancipated, and acquired another settlement for himself, took the settlement of the father. The settlement so taken might be a settlement derived from a grandfather or an even earlier ancestor. A child, whether under or over sixteen, might become emancipated, e.g., by leaving the parental home or by apprenticeship, and, when emancipated, could acquire a settlement for him or herself. The Act of 1876 altered the former law by abolishing derivative settlements, except as therein mentioned, and fixed the age of emancipation at sixteen: see per Lord Watson in *Reigate Union v. Croydon Union*. (1) Before the Poor Law Amendment Act, 1834, an illegitimate child, who had not acquired a settlement, always took a birth settlement. Sect. 71 of that Act provided that such a child should take the settlement of its mother till it should attain the age of sixteen, or acquire a settlement in its own right, the effect of that enactment being that, when an illegitimate child attained the age of sixteen, it reverted to its birth settlement. Sect. 35 of the Act of 1876 provides that such a child shall retain the settlement of the mother until it acquires another for itself. The Poor Removal Act, 1846 (9 & 10 Vict. c. 66), s. 1, created something quite different from a settlement, namely, a status of irremovability, which continues only as long as the person irremovable remains in the same parish. That status was under that Act conferred by residence for a period of five years, which was afterwards reduced to three years by the Poor Removal Act, 1861 (24 & 25 Vict. c. 55), s. 1, and again to one year by the Union Chargeability Act, 1865 (28 & 29 Vict. c. 79), s. 8. Sect. 34 of the Divided Parishes and Poor Law

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(1) 14 App. Cas. 465, at pp. 482-4.



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Amendment Act, 1876, provides for the acquisition of a settlement by residence for a period of three years under such conditions in each of such years as would confer irremovability, and, so far as the terms of that section, if it stood alone, are concerned, they would no doubt support the contention of the appellants. They must, however, be read together with and so as not to be inconsistent with s. 35, which expressly provides that a child under the age of sixteen shall take the settlement of its parent, and that an illegitimate child shall retain the settlement of its mother until it acquires another settlement. It is submitted that that section must be read as qualifying s. 34 as regards children under sixteen, and that its effect is to shew that an unemancipated child, i.e., a child under the age of sixteen, cannot have an acquired settlement. In the case of *West Ham Union v. Holbeach Union* (1) the person whose settlement was in question was over the age of sixteen when the question arose. All that that case decided was that the entire period of residence necessary to confer a settlement may take place at an age under sixteen. It did not decide that the settlement was acquired under that age. In *Reigate Union v. Croydon Union* (2) Lord Watson distinctly said that the effect of s. 35 is to fix the age of emancipation at sixteen, and that the provisions of the third clause of s. 35 have no application to children under sixteen; and his language on p. 484 of the report and that of Lord Macnaghten in *West Ham Union v. Holbeach Union* (3) implies that the effect of s. 35 is that unemancipated children are incapable of acquiring a settlement for themselves while unemancipated, and that the word "person" in s. 34 must be read as subject to an exception in the case of a child under the age of sixteen. This Court has held in many cases that this so: see *West Derby Union v. Atcham Union* (4) and *Manchester Overseers v. Ormskirk Union* (5), which latter case is directly in point. The observations of the Master of the Rolls and the Lords Justices in *West Ham Union v. Holbeach Union* (6) favour

(1) [1903] 2 K. B. 627; [1904] 2 K. B. 121; [1905] A. C. 450.

(2) 14 App. Cas. 465, at pp. 482-4.

(3) [1905] A. C. 450.

(4) (1889) 24 Q. B. D. 117.

(5) (1890) 24 Q. B. D. 678.

(6) [1904] 2 K. B. 121.

the view that a child, while under sixteen, cannot acquire a settlement by residence, because they rely on the fact that the person whose settlement was there in question was over sixteen as rendering what Lord Watson said in *Reigate Union v. Croydon Union* (1) inapplicable: see also per Fry L.J. in *Mitford and Launditch Union v. Wayland Union*. (2)

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Sect. 3 of the Poor Removal Act, 1846, does not confer a status of irremovability on children coming within it. It merely provides for an exemption from being removed under the circumstances mentioned in the section, in order to prevent the breaking up of families. Sect. 1 of the Act is the section which confers the status of irremovability; and, by the proviso to that section, for which a proviso in somewhat different, but for this purpose similar, terms is substituted by 11 & 12 Vict. c. 111, the status of children as to removability or irremovability is to be derived from and to follow that of their parent. It is not an independent status acquired by the child by its own residence. In *West Ham Union v. Holbeach Union* (3) the person whose settlement was in question had resided in West Ham for the requisite period with her mother, who was irremovable from that parish. In the present case the paupers' mother was clearly removable to her husband's place of settlement, because her status followed his, and he was irremovable from and settled in Charlton-next-Woolwich. [They also cited *Reg. v. St. Anne, Blackfriars* (4); *West Ham Union v. St. Matthew, Bethnal Green*. (5)]

*Rawlinson, K.C.*, for the appellants, in reply. The proviso to s. 1 of the Poor Removal Act, 1846, does not apply to illegitimate children. It is a general principle of construction that prima facie the word "child" in a statute means a legitimate child. The case of *Reg. v. Maude* (6) is a conclusive authority in favour of the appellants on that point. That being so, the earlier portion of s. 1 applies, and, even assuming that the respondents' contention as to the effect of s. 3 is correct, the paupers acquired

(1) 14 App. Cas. 465, at pp. 484, 486. (3) [1903] 2 K. B. 627; [1904] 2 K. B. 121; [1905] A. C. 450.  
(2) (1890) 25 Q. B. D. 164, at pp. 173, 174. (4) (1853) 22 L. J. (M.C.) 137.  
(5) [1894] A. C. 230.  
(6) (1842) 2 Dowl. N.S.) 58.

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the status of irremovability under s. 1 on their own account, which status having continued for more than three years is converted into a settlement by s. 34 of the Act of 1876.

VAUGHAN WILLIAMS L.J. I have come to the conclusion that this appeal must be allowed. The argument, which, as necessarily happens in cases of this kind, covered a good deal of ground, ultimately worked itself out in a somewhat unexpected way, and we have to deal with a point that arose, as it were, accidentally in the course of the discussion. The counsel for the appellants was pressed with the view that s. 3 of the Poor Removal Act, 1846, upon which he was relying, had nothing to do with the status of irremovability, but was aimed only at the prevention of the breaking up of families, that the Legislature did not mean thereby to alter the law as to irremovability as laid down in s. 1 of the Act, but merely to mitigate the severity of the application of the law as to removal in the case of children living with certain persons enumerated, who might be considered as the heads of families. Putting aside the question as to the applicability of the proviso to s. 1 to illegitimate children, with which I shall have to deal hereafter, it would be impossible, if that proviso applied, to say that the paupers in this case had acquired irremovability under s. 1; for it is clear that their mother was removable, and therefore they would be so too. As I have said, the appellants' counsel was relying on s. 3 of the Poor Removal Act, 1846, in order to establish the irremovability of the paupers; but, if that section was only intended to mitigate the severity of the law as to removal in the way I have mentioned, but not to alter in any way the conditions upon which irremovability depends, then he felt that he would be in a difficulty, assuming that the whole of s. 1, including the proviso, applied to the case. That being so, he argued that the proviso to the section did not apply in the case of an illegitimate child. He relied for the purpose of that argument upon the technical rule of law that the word "child" or "children" means a legitimate child or legitimate children, and that meaning must *prima facie* be given to the word whenever it occurs in a statute. It is of course true that that is only *prima facie* the meaning to be given

to the word, and that a wider meaning may, in the case of some statutes, be given to it, so as to include an illegitimate child or illegitimate children, where that meaning is more consonant with the object of the statute. Although that is so, I cannot say that, in the case of the enactment in question, I find any object plainly aimed at which would make it more consonant with the scope of the Act that we should depart from what is *prima facie* the meaning of the word and construe it as including illegitimate children. But, apart from that consideration, there is another reason why I should hesitate so to construe it. A long time has now elapsed since 1846 and during all that length of time numerous cases must have occurred in which the question whether the proviso to s. 1 of the Act was applicable to an illegitimate child might have been raised: but, apparently, there is no case in the books in which that point was raised, and, when one inquires what the practice of poor law administration has been in the matter, one cannot find that there has been any practice which is inconsistent with giving to the word "children" in the proviso its *prima facie* meaning of legitimate children. Moreover, we have had cited to us the case of *Reg. v. Maule* (1), which is very much in point to the present case. The judgment in that case was delivered by Wightman J., and he pointed out that, where the word "child" is used in the Poor Law Amendment Act, 1834, as for example in s. 56, a legitimate child only is intended, and, when it is meant that the word should have a more extensive signification, it is expressly so declared, as in s. 57, by which a husband is made liable to maintain the children of his wife born before the marriage, whether legitimate or illegitimate. The effect of his judgment is to lead one to the conclusion that in these poor law statutes generally, where the word "child" is used without more, a legitimate child is meant, and, where a wider meaning is intended, the Legislature has again and again added such words as "whether legitimate or illegitimate." Of this s. 3 of the very statute which we are discussing, namely, the Poor Removal Act, 1846, affords an example. In the case of the proviso to s. 1 of the Poor Removal Act, 1846, an additional reason for supposing that the word "children" is used in the

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(1) 2 Dowl. (N.S.) 58.



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sense of legitimate children is afforded from the collocation of the word with the word "wife," and the fact that, the term "person" therein being used in relation to a husband, the inference arises that the children thereby contemplated are the children of such a husband and wife. Under these circumstances I cannot avoid the conclusion that in the proviso to s. 1 the word "children" must receive its *prima facie* meaning, and therefore does not apply to illegitimate children. The consequence is that, as regards such children, we must look back to the enacting part of the section, which provides that "no person shall be removed" from a parish in which that person has resided for the period and under the conditions mentioned in the section. That provision appears to include illegitimate children, and, inasmuch as under the Act of 1876 three years' residence under such conditions as would under the Poor Removal Acts confer the status of irremovability confers a settlement, it seems to me that, *prima facie*, illegitimate children who have so resided with their mother have acquired a settlement, not a derivative settlement through the mother, but an independent settlement in their own right, acquired through their own residence. Under these circumstances it would appear, apart from the considerations to which I will presently allude, that the paupers in this case have acquired an independent settlement of their own by residence in the parish of Lambeth.

But then the suggestion is made that under the Act of 1876 a child, whether legitimate or illegitimate, cannot, while under the age of sixteen, acquire an independent settlement. In this particular case we have only to deal with illegitimate children, and I do not propose to deal with the case of a legitimate child at all. The question depends upon ss. 34 and 35 of the Divided Parishes and Poor Law Amendment Act, 1876. I have to deal first with the argument that the word "person" in s. 34 must, having regard to the provisions of s. 35, be read as not including a child under sixteen. It appears to me that, however much there might have been to be said for that contention at a time when the construction of the statute was *res integra*, and no decision had been given upon its meaning, it is one which it is very difficult to sustain having regard to the decisions to which our attention

has been called. As I understood the respondents' counsel, they did not deny that the judgments in the cases of *West Ham Union v. Holbeach Union* (1) and *Reigate Union v. Croydon Union* (2) make it impossible to contend that, as far as irremovability is concerned, the word "person" does not include a child under sixteen: and it appears to me that, having regard to the judgments in the case of *Reigate Union v. Croydon Union* (2), and particularly that of Lord Halsbury, it is very difficult, if not impossible, to deny that, given three years of residence under conditions that would confer a status of irremovability, a child under sixteen would, just as much as would anyone else under the same conditions, be entitled to the settlement which, by the terms of the Act, *prima facie* is conferred on any person, including unemancipated persons, who has resided for the requisite period under the requisite conditions. In *Reigate Union v. Croydon Union* (3) Lord Halsbury said: "The pauper had by more than the necessary period of residence acquired a status of irremovability, and so was 'settled' in the parish of Rhydgwern. It is true that during a part of that period she was under sixteen years of age, and it is true that, if it be assumed, as it was by the Court of Appeal, that unemancipated residence will not suffice, then she has not accomplished the necessary period of emancipated residence. The statute knows no such distinction. It makes the emancipated and unemancipated equally irremovable, and if so the periods of emancipated and unemancipated residence may be put together. It is clear therefore that in this case there was for more than three years a status of irremovability in each of the three years, and therefore the pauper acquired a settlement." I confess that I never have been quite able to grasp the argument by which, although it is admitted that a person could by a residence partly before and partly after the age of sixteen acquire the status of irremovability and through that an independent settlement, the conclusion is nevertheless arrived at that a residence for the requisite number of years taking place entirely before the age of sixteen would not bring about the same result. Under these circumstances I

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(1) [1903] 2 K. B. 627; [1904] 2 K. B. 121; [1905] A. C. 450.

(2) 14 App. Cas. 465.

(3) 14 App. Cas. 465, at p. 480.

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cannot resist the conclusion that "person" in s. 34 does include an unemancipated illegitimate child. It is said that there are passages in the judgment of Lord Watson in *Reigate Union v. Croydon Union* (1) and that of Lord Macnaghten in *West Ham Union v. Holbeach Union* (2) with regard to the effect of s. 35 of the Act of 1876, which favour the notion that an unemancipated child cannot acquire an independent settlement for itself during the period of non-emancipation. We have, however, to deal with the words of s. 34, and, as I have said, I cannot see why *prima facie* the word "person" in that section and the subsequent words "until he shall acquire a settlement in some other parish by a like residence or otherwise" should not include an illegitimate child under the age of sixteen. But this being the case of an illegitimate child, one has also to consider the earlier provision of the Poor Law Amendment Act, 1834, s. 71, which provides that "every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child, until such child shall attain the age of sixteen, or shall acquire a settlement in its own right." Now to my mind there cannot be a doubt that those words do by inference affirm the power of such an illegitimate child to acquire a settlement for itself, and in the judgment of Wills J. in *West Ham Union v. Holbeach Union* (3) he based an argument on that section. He said: "The case seems to narrow down to the simple question whether it is possible for a child under sixteen to acquire a settlement under s. 34. If so, s. 35 has no application to this case, because of the words 'until it shall acquire another settlement,' and 'if any child in this section mentioned shall not have acquired a settlement for itself.' It certainly would be odd if the Legislature were to talk of a child acquiring a settlement, and yet at the same time to say that no one whom one would call a child was capable of acquiring a settlement. *Reg. v. Elvet* (4) seems to me to be a distinct authority for saying that a person under the age of sixteen years can acquire a status of irremovability; and, if that is so, then s. 34 operates to turn that status, if maintained for three consecutive years, into a settlement. It

(1) 14 App. Cas. 465, at p. 484.

2) [1905] A. C. 450.

(3) [1903] 2 K. B. 627, at p. 632.

(4) (1859) 2 E. & E. 266.

is no doubt true that in *Overseers of Manchester v. Guardians of Ormskirk Union* (1) Lord Coleridge C.J. expressed the view that a person under the age of sixteen could not acquire a settlement for himself; but I do not think that view can be supported when s. 71 of the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), is looked at. It is plain from that section that there is no innate impossibility that a child under the age of sixteen should acquire a settlement. The language of that section would be altogether inept if a child could not acquire a settlement for itself until after it had attained the age of sixteen. I think, therefore, that there is no natural incapacity in a child to acquire a settlement, and, if so, I do not see why it should not be able to do so under the provisions of s. 34." I really think that I should be wasting time if I were to labour this point much more, after reading that passage from the judgment of Wills J., with which I entirely agree. It must be remembered that, although the judgment of Lord Coleridge C.J. in *Manchester Overseers v. Ormskirk Union* (1) had not been overruled before the judgment in *West Ham Union v. Holbeach Union* (2), doubt had been thrown upon its correctness by what had been said in the House of Lords. With regard to the observations of Lord Watson in *Reigate Union v. Croydon Union* (3), he no doubt for the purpose of reference does describe the provisions of s. 35, and those of the Poor Law Amendment Act, 1834, s. 71, as to the retention of the parentage settlement by a child up to the age of sixteen, as if the words "until it shall acquire another" and "shall acquire a settlement in its own right" were not in the sections respectively. I do not suppose for a moment that he forgot the existence of those words, but the result seems to have been that Lord Coleridge C.J. in the case of *Manchester Overseers v. Ormskirk Union* (1), dealt with the sections as though they did not contain those words.

It was contended for the respondents that, even if an illegitimate child could, while under sixteen, reside so as to acquire a settlement under s. 34, still they are in the right, because such a child cannot acquire a settlement by such residence as long as it

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(1) 24 Q. B. D. 678.

(2) [1905] A. C. 450.

(3) 14 App. Cas. 465, at p. 484.



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is under sixteen, and in support of that proposition they relied on certain observations of the Master of the Rolls and of Romer L.J. and Mathew L.J. in *West Ham Union v. Holbeach Union*. (1) I think, I must confess, that the observations so relied upon do rather tend to shew that some such idea was present to the mind of those learned judges, but they had not got to decide that point, and they did not decide it. The case before them did not raise the question whether under s. 34 a child under the age of sixteen can reside so as to acquire a settlement, not to take effect upon the completion of such residence, but to be postponed until the child attains the age of sixteen, and I cannot find that anywhere in their judgments any such proposition as that is affirmed.

Under these circumstances it appears to me there is nothing to prevent our taking the view which was taken in the King's Bench Division by not only Wills J. and Channell J., but also, I think, by the Lord Chief Justice himself, when the case of *West Ham Union v. Holbeach Union* (2) was before him. That being so, I have come to the conclusion that, there being no case in which the possibility of such a "suspension," as it has been called, of a settlement acquired by a child under the age of sixteen has been affirmed, or contended for, or even discussed, there is no ground for the contention of the respondents in this respect. The term "suspension" is, no doubt, not entirely unknown to the poor law in connection with the law of settlement, but the case in which it has been used did not relate to the suspension of the effective acquisition of a settlement after the occurrence of the events by which the settlement is acquired, but to the suspension of the enjoyment of an existing settlement, where a woman by reason of marriage cannot continue to enjoy the same during coverture. I do not think that I need refer in detail to the judgments given in the Divisional Court in this case. But with reference to the observations made by the Lord Chief Justice in his judgment, I cannot help saying that, speaking for myself, I think that the language used in the House of Lords in the case of *Reigate Union v. Croydon Union* (3), coupled with the fact

(1) [1904] 2 K. B. 121.

(2) [1903] 2 K. B. 627.

(3) 14 App. Cas. 465

that no suggestion was ever made that the settlement acquired through residence by a child under the age of sixteen would not take effect at once, leads me to think that, if this point had arisen before the House of Lords in *Reigate Union v. Croydon Union* (1), or before the Court of Appeal in *West Ham Union v. Holbeach Union* (2), they would not have decided, at all events in the case of an illegitimate child, that there was anything to prevent the settlement from taking effect at once. It is from no want of respect to the judges in the Divisional Court that I do not go at greater length into this question of "suspension," as it has been called, of the settlement acquired by residence in the case of a child under sixteen. A great deal has been said to us on one side and the other as to this question, but I think that really, when one has once decided that the word "person" in s. 34 includes a child under sixteen, the effect of the section, as conferring a settlement taking effect immediately upon its acquisition by the requisite period of residence, cannot be more accurately expressed than in the judgments of Wills J. and Channell J. in *West Ham Union v. Holbeach Union*. (3) I do not mention the judgment of the Lord Chief Justice himself in that case, because in the case now before us he seems to have thought that the judgments of Wills J. and Channell J. in *West Ham Union v. Holbeach Union* (3) went too far. But for that I should have mentioned his judgment too, and been disposed to say that it was to the same effect as theirs. For these reasons I have come to the conclusion that this appeal should be allowed.

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STIRLING L.J. I have arrived at the same conclusion. I do so with some diffidence, inasmuch as the subject is one with which I am not very familiar, the statutes bearing upon it are complicated, and the decisions upon them are not free from difficulty. Down to a late period in the argument I remained unconvinced that the decision of the Divisional Court ought to be departed from, but at length I have come to the conclusion that it should be reversed. I will state my reasons as shortly

(1) 14 App. Cas. 465.

(2) [1904] 2 K. B. 121.

(3) [1903] 2 K. B. 627.

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as possible. I begin with the Poor Law Amendment Act, 1834, s. 71, which provides that "every child which shall be born a bastard after the passing of this Act shall have and follow the settlement of the mother of such child, until such child shall attain the age of sixteen, or shall acquire a settlement in its own right." No subsequent statute or decision appears to have affected that enactment. In the present case the paupers are under the age of sixteen; and, therefore, unless they have "acquired settlements in their own right," to use the language of the Act, they must have the settlement of their mother. The contention of the appellants is that in the circumstances of the case they have acquired settlements in their own right under the Act of 1876 in the parish of Lambeth. It is not, apparently, disputed that, at the date when that Act was passed, it was possible for an illegitimate child under sixteen to obtain a settlement in its own right in various ways, of which it is only necessary to mention, by way of example, one, namely, apprenticeship. The settlement now set up is not one acquired by any of the modes by which a settlement could prior to 1876 have been acquired by an illegitimate child, but one alleged to have been acquired under the Divided Parishes and Poor Law Amendment Act, 1876, which, coupled with the Poor Removal Act, 1846, and the Acts amending that Act, created a new head of settlement. I will deal with the statutes in the order of their dates. The Poor Removal Act, 1846, s. 1, provides that "no person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years next before the application for the warrant," &c. The first question is whether that provision applies to an illegitimate child under sixteen. I think it impossible to say that it does not. Such an illegitimate child is a person, and, unless there is something in the rest of the Act to indicate that such was not the intention, I think that its full effect must be given to the word "person." So far from there being any such indication, it appears to me that there are indications to the contrary. But there is a proviso to the section, which enacted that, "whenever any person shall have a wife or children having no other settlement than his

or her own, such wife and children shall be removable whenever he or she is removable, and shall not be removable when he or she is not removable." The question arises whether that proviso applies to an illegitimate child. That is, I think, a question of some difficulty; but, regard being had to the decision in *Reg. v. Maude* (1) upon very similar language, and also to the circumstance that in s. 3 of the Act, where the Legislature desired to include the case of an illegitimate child, it is expressly referred to, I cannot find any satisfactory reason for departing from that which is the *prima facie* meaning of the word "child" when used in a statute. Sect. 3 enacts that "no child under the age of sixteen years, whether legitimate or illegitimate, residing in any parish with his or her father or mother, stepfather or stepmother, or reputed father, shall be removed, nor shall any warrant be granted for the removal of such child, from such parish, in any case where such father, mother, stepfather, stepmother, or reputed father may not lawfully be removed from such parish." The effect of the provisions of the Act appears to me to be as follows: Sect. 1 appears to confer on the persons therein described a certain status, i.e., that of irremovability, with a proviso that in the case of legitimate children the status of children in that respect shall be that of the parent. Sect. 3 I understand to be an administrative provision that, notwithstanding anything in the previous part of the Act, children are not to be removed in the cases therein provided for, in order to prevent the breaking up of families. I should mention that by the subsequent statute (11 & 12 Vict. c. 111) passed in 1848, the proviso to s. 1 of the Act of 1846 was repealed and a new proviso substituted, which is for the present purpose practically to the same effect, though certain words were added which may be important from some points of view. If this be the true construction of the statute, the result is that by s. 1 a status of irremovability is conferred on an illegitimate child after a residence for the statutory period, which is now reduced to one year; and, the proviso being inapplicable, that status is not acquired in a derivative manner, as would be the case if the proviso, whether as it stood in the Act of 1846

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That being so, we come to the Divided Parishes and Poor Law Amendment Act, 1876. Sect. 34 of that Act provides that, "where any person shall have resided for the term of three years in any parish in such manner and under such circumstances in each of such years as would in accordance with the several statutes in that behalf render him irremovable, he shall be deemed to be settled therein, until he shall acquire a settlement in some other parish by a like residence or otherwise." The question is whether the word "person" in that section includes a child under sixteen, whether legitimate or illegitimate. Again, such a child is a person; and I think that *prima facie*, and in the absence of reason to the contrary, the word "person" must include such a child. The effect of the legislation therefore appears to me to be that, in the case of an illegitimate child—and we have to deal only with such children in the present case—who has resided in a parish for the period of three years in such manner as by the statutes in that behalf, particularly the Poor Removal Act, 1846, would render him irremovable, the status of irremovability is converted into a settlement. It appears to me that this effect is produced by the residence of the child itself, and not by that of the parent, and that by such residence the child has, within the meaning of the Poor Law Amendment Act, 1834, s. 71, "acquired a settlement in its own right."

I will add only a few remarks with regard to one or two matters. First, it will be observed that the view which we are taking in this case does not necessarily lead to the same result in the case of legitimate children, for it depends on the fact that the status of irremovability is acquired under the first portion of s. 1 of the Act of 1846, and the circumstance that the proviso to that section does not apply to an illegitimate child. In the case of a legitimate child the proviso as modified by the Act of 1848 would apply, and the status of irremovability would appear not to be acquired by the child in its own right, but to depend on the right of the parent. Secondly, I do not think that we are really departing from anything that was said by Lord Watson in

the case of *Reigate Union v. Croydon Union*. (1) It is to be observed that on p. 483 of the report of the case he cites the enactment in s. 71 of the Poor Law Amendment Act, 1834, in full, and does not omit to take notice of the words "until such child shall acquire a settlement in its own right." So that he did not overlook the qualification so imposed on the previous provision that the child shall follow the settlement of the mother until it attains the age of sixteen, although on p. 484 of the report he did not repeat that qualification; for, after summing up the effect of s. 35, he speaks of the provision of the Poor Law Amendment Act, 1834, as being that an illegitimate child shall retain its parentage settlement until it has reached the age of sixteen. Therefore I do not think that we are deciding anything contrary to what he said in that case. Lastly, I wish to say, with regard to the decision of the Court below, that the case, as it has shaped itself before us, involves a point which, apparently, was not raised or discussed before them.

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FLETCHER MOULTON L.J. I am of the same opinion. In view of the full judgments which have been already delivered, I will only say a few words, putting in a skeleton form the manner in which the statutes on the subject appear to me to operate under the circumstances of the present case.

By the Poor Removal Act, 1846, the Legislature introduced the system by which persons were given the right of irremovability from a parish by reason of the fact of their having resided therein for a certain period, now fixed at one year. That Act conferred no settlement, but by the Act of 1876 the Legislature proceeded to provide that, if this status of irremovability continued for the period of three years, a settlement should thereby be acquired. Consequently any person who has resided in a parish under the requisite conditions for a period of three years will (apart from some peculiarity of personal status which prevents the operation of these general enactments) have acquired a settlement in such parish. The paupers with whom we are dealing here are persons who have so resided for three

(1) 14 App. Cas. 465.

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years in the parish of Lambeth ; but it is argued on behalf of the respondents that they have not acquired a settlement in that parish, because of a peculiarity of their personal status, namely, that they are illegitimate children under the age of emancipation. It is clear that those who say that these paupers have not for that reason acquired the settlement which an ordinary person would under the circumstances acquire must maintain the exception which they thus assert to exist. They seek to do so in the first place by saying that the statutes relating to the residence by which a settlement may be acquired do not include the residence of unemancipated persons, or, in other words, that the word "person" in the 1st section of the Act of 1846, and in s. 34 of the Act of 1876, does not include an unemancipated person. I can see no reason why this should be so, but it is not necessary for us to consider that point, because we are bound by two decisions in the House of Lords, the effect of which is shortly expressed by what was said by Lord Halsbury in the case of *Reigate Union v. Croydon Union*. (1) He says there in plain terms that the statute draws no distinction between the emancipated and the unemancipated, but makes them equally irremovable.

The second ground upon which it was argued that the peculiarity of personal status which I have mentioned prevents the ordinary results of residence in this case was that the terms of the earlier part of the 1st section of the Act of 1846 are not absolute, but are controlled by the proviso at the end of the section, which in the case of children creates what may be called a derivative removability or irremovability, as the case may be ; that by the proviso children are removable when the parent (in this case the mother, as they had no legal father) is removable, that she was at all times removable to the parish in which her lawful husband had his settlement, and that therefore the residence of the paupers in the present case was not such as to confer upon them a status of irremovability, and, consequently, could not confer upon them a settlement in the parish of Lambeth. The proviso as it originally stood appears to have given rise to some difficulty, and it was amended by the Act of 1848. That Act makes the

(1) 14 App. Cas. 465, at p. 480.

provisions as to this derivative status of removability or irremovability override the provisions for absolute irremovability contained in the Act of 1846, and therefore the crucial point is whether illegitimate children are within the proviso as amended. For the reasons given by my brother Lords Justices I am satisfied that the word "children" in the proviso, whether in its original form or as amended, refers only to legitimate children. I have not been able to find in the statutes relating to the poor law any case in which the word "child" is used in relation to illegitimate as well as legitimate children without the Legislature having used express words to render their meaning in this respect perfectly clear. Therefore it seems to me that the Legislature in framing these statutes intentionally acted on the view that the word "child," used alone, would, according to its ordinary meaning, signify a legitimate child. It follows, therefore, that these paupers, being illegitimate, are not within the proviso, and that this contention of the respondents fails.

Finally it was argued that the personal status of illegitimate children under sixteen excludes them from the benefit of acquiring a settlement under s. 34 of the Act of 1876, by reason of special legislation with regard to such children, which prevents their coming within the word "person" as used in that section. Two sections have been referred to in this connection. One is s. 71 of the Poor Law Amendment Act, 1834, which provides that an illegitimate child shall follow the settlement of its mother until it shall attain the age of sixteen or acquire a settlement in its own right. There is nothing in such a provision to prevent a subsequent statute which creates a new mode of acquiring a settlement having full effect with regard to such an illegitimate child. The other enactment referred to is s. 35 of the Act of 1876. I am utterly unable to see anything in the provisions of that section upon which reliance can be placed in support of the respondents' contention. It provides that an illegitimate child shall retain the settlement of its mother "until it acquires another." These words occur in a section immediately following one which provides a new mode of acquiring a settlement. They merely provide for the period antecedent to the child's acquiring a settlement other than that of its mother (whether under the preceding section or

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Great reliance has been placed by counsel for the respondents upon a passage in the judgment of Lord Watson in *Reigate Union v. Croydon Union*. (1) Apart from any consideration of the controlling authority of the House of Lords, I should feel the utmost respect for even the slightest indication of opinion from him, but I can find nothing in his judgment to support their contentions. The whole difficulty has arisen from the fact that an imperfect citation of a legislative enactment by him in his judgment, which citation, though imperfect, was sufficient for the purpose of what he was there saying, has been taken as amounting to a solemn decision that the enactment so cited must be read in that imperfect form. One has only to refer to the passage which has been cited by Stirling L.J. from the previous page of the report to see that Lord Watson thoroughly realized the full effect of the enactment, although, as the words which he subsequently omitted had no bearing upon what he was there dealing with, he did not think it necessary to cite the enactment again in extenso.

*Appeal allowed.*

Solicitors for appellants: *Callard & Vulliamy*.

Solicitor for respondents: *T. Blanco White*.

(1) 14 App. Cas. 465, at p. 484.

[IN THE COURT OF APPEAL.]

TULLOCK *v.* B. WAYGOOD & CO., LIMITED.

C. A.

1906

May 25.

*Employer and Workman — Compensation — Hydraulic Lift — “Engineering Work” — Repairs — Using Machinery driven by Mechanical Power — Workmen’s Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 7, sub-s. 2.*

The “machinery driven by steam, water, or other mechanical power” referred to in the definition of “engineering work” in s. 7, sub-s. 2, of the Workmen’s Compensation Act, 1897, includes, not only mechanical power supplied by the undertakers for the purpose of repairs, but also mechanical power which is actually part of the work on which the workman is engaged when he meets with the accident for which compensation is claimed.

THIS was an appeal against the award of the judge of the county court of Oxford upon a claim for compensation under the Workmen’s Compensation Act, 1897.

The applicant, a workman in the employ of the respondents, a firm whose business was, amongst other things, the manufacture and repair of lifts, was sent by them to examine and repair a dinner lift at Blenheim Palace. While engaged on this work, and while availing himself of the hydraulic power of the lift, partly to put himself in a position to carry out the repairs and partly to test how far they had been effective, he met with an accident, in consequence of an unexpected upward movement of the lift, for which he had been awarded compensation by the county court judge.

The employers appealed. The appeal was heard on May 25.

*C. A. Russell, K.C.*, and *Ellis Hill*, for the appellants. The “machinery driven by steam, water, or other mechanical power” referred to in the definition of “engineering work” in s. 7, sub-s. 2, of the Workmen’s Compensation Act, 1897, refers only to mechanical power supplied by the undertakers for the purposes of repairs, and does not include mechanical power which is actually a part of the work on which the man is engaged when he meets with an accident. The machinery driven by mechanical power must be external to the work in order that the work

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under repair may come within the definition of an "engineering work." This work was admittedly not being repaired by means of machinery actuated by mechanical power supplied by the undertakers. The lift and its hydraulic apparatus as a whole was the thing under repair, and the repair was being carried out by manual labour, not by means of machinery supplied by the employers. In order to come within the Act the work under repair must be of such a kind as to require machinery driven by mechanical power to repair it. The mere fact that the subject-matter of the repairs is a machine does not make it an "engineering work."

The "work" referred to is something having geographical boundaries: *Back v. Dick Kerr & Co., Ltd.* (1); the lift and its apparatus is the locality on which repairs are being carried out and in which machinery supplied by the undertakers must be in use for repair before the applicant can get compensation. The county court judge was wrong in awarding compensation in this case.

*A. Powell, K.C.*, and *Addington Willis*, for the respondent, were not called upon.

COLLINS M.R. I am of opinion that the learned county court judge was right in his decision of this case. [After shortly stating the facts as above, the Master of the Rolls continued:—]

In order to bring this case within the Workmen's Compensation Act, 1897, it must be shewn that the work the applicant was engaged upon at the time of the accident was an "engineering work," which, by s. 7, sub-s. 2, of the Act, means "any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer" (this particular work does not come under any of those heads), "and includes any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used." Now it is quite clear that a lift would come under the description of "other work," but in order to make it an "engineering work" it must be "other work for which"—I leave out the unnecessary words—"machinery driven by water power is used." Unquestionably, the lift being a work,

machinery actuated by water was used for the repairing of the lift. There is no doubt about that; but it is said that unless the machinery actuated by water is machinery not embraced within the engineering work itself—unless it is something outside, external to, as I understand it, the engineering work itself—the case is not brought within the definition. My first answer is that I do not see anything in the Act to exclude the power inherent in the engineering work itself from being the power which is used for the purpose of the repair. This view does not, as asserted by Mr. Russell in his argument, involve the position that, once given the subject-matter of the operation is a machine (you may call it a machine in motion if you like), that necessarily makes it engineering work. Machinery, wherever it be, whether it be inherent in the subject-matter of the repair or not, in order to get it within the definition, must be used for the purpose of construction or alteration or repair. If you can make the machinery in the engineering work itself available for that purpose, I do not see why it does not equally bring it within the definition as though you had got your machinery from somewhere else; and if one may, in this Act, look to any principle, or entertain any presumption that it was based upon principles of common sense, one does see that the Act is not made universal in its application to all these employments. Some are singled out from others apparently because they involve more risk, and it would seem that, because some operations involve more risk than others, those operations are covered. Engineering work of itself, merely by the definition, means any work of construction, or alteration, or repair of a railroad, harbour, dock, canal, or sewer. It seems to me that all work done on such subject-matter is, in the view of the Legislature, taken to presuppose some element of danger; and then they go on to subject-matters which may not in themselves *prima facie* presuppose an element of danger, but which include “any other work for the construction, alteration, or repair of which machinery driven by steam, water, or other mechanical power is used.” Therefore it would seem that by introducing those elements you introduce the very element of danger by which the workman, if he is subject to it, is entitled to the benefit of the Act. The element of danger to him is

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precisely the same whether he is actually engaged in repairing the machine which is put in motion for the purpose of the repair, or whether he draws the mechanical power from somewhere else; he is thrown into juxtaposition with machinery in motion. Therefore, if there be any principle in this Act, it seems to me it is in favour of the learned county court judge's view in this case. There is no distinction in principle whatever, so far as the workman is concerned, whether that which supplies the mechanical power is what he is working upon, or whether he gets it from elsewhere.

In my opinion the learned county court judge was right, and this appeal fails and must be dismissed.

ROMER L.J. I agree with what the Master of the Rolls has said and with the learned county court judge's clear judgment, and have nothing to add.

COZENS-HARDY L.J. I agree.

*Appeal dismissed.*

Solicitors: *Leslie Field, Brownjohn & Co.; Spencer, Gibson & Sons.*

W. C. D.

[IN THE COURT OF APPEAL.]

LOWE v. M. MYERS &amp; SONS.

C. A.

1906

May 28.

*Employer and Workman—Accident—Claim for Compensation—Defence of no Claim being made within Statutory Period—Evidence of Claim—Particulars of Demand and Answer—Admission from Answer—Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), s. 2—Workmen's Compensation Rules, 1898—1900, r. 17.*

A claim for compensation under the Workmen's Compensation Act, 1897, need not be in writing.

The respondents to an application for compensation under the Workmen's Compensation Act, 1897, by their answer stated as a fact which they desired to bring to the notice of the arbitrator that within a few weeks of the accident they had paid to the applicant a certain sum which he had accepted in satisfaction of all claims, and they denied any further liability under the Act. The answer also raised the defence that no claim for compensation was made within six months of the accident. The county court judge dismissed the application on the ground that there was no evidence of a claim having been made within the statutory six months :—

*Held*, that the statement in the answer as to the payment of compensation was an admission of fact on which the applicant was entitled to rely and afforded some evidence of a claim having been made, and that the application ought to be remitted to the county court judge for a rehearing.

The nature of the particulars of demand and the answer under the Workmen's Compensation Act, 1897, discussed.

APPEAL from an award of the deputy judge of the Birmingham County Court on an application for compensation under the Workmen's Compensation Act, 1897.

The applicant was employed by the respondents, who were pen manufacturers, to attend to certain machinery at a salary of 3*l.* per week. On November 4, 1902, the applicant, while engaged in taking a pulley off a shaft at the respondents' works, placed the pulley on some steps, and as he was coming down the steps the pulley slipped on to his head and produced a fracture of the skull. He went to a hospital, and after a month's absence he returned to work with the respondents and remained in their employment until May, 1903, when he was dismissed. He still felt the effects of

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the accident, and after being employed for a short time by two other firms his condition grew worse and his mind became affected, and in November, 1903, he became wholly incapacitated from work. Eventually he was confined in a lunatic asylum, where he now was. The application for compensation was made in October, 1905, by the applicant suing by his wife as next friend. In the particulars appended to the application, which was in Form 1 in the Appendix to the Workmen's Compensation Rules, 1898 to 1900, the nature of the injury and the extent of the applicant's incapacity were set forth, and it was then stated (among other things) that the applicant had received from his employers a payment, not being wages, of 6*l.* in respect of the injury, and that the applicant claimed as compensation 1*l.* a week during the period of total incapacity. It was also stated that the statutory notice of accident had not been served upon the employers, and the reason for the omission to serve the notice was stated to be the payment of compensation above referred to. The respondents in their answer, which was headed "In the matter of an arbitration under the Workmen's Compensation Act, 1897," and was partly in print and partly in writing, being made on a printed form in accordance with Form 8 in the Appendix, stated that the applicant's particulars were inaccurate or incomplete in certain minor respects, and in particular they stated that the applicant had not received 6*l.* from the employers. The answer then proceeded as follows :—

"That the respondents desire to bring to the notice of the judge [or arbitrator] the following facts :—That on the 9th day of December 1902 the applicant agreed to accept 2*l.* in full settlement of all claims in respect of the accident which occurred to him on the 4th day of November 1902 and was on the same 9th day of December 1902 paid such sum of 2*l.* which the applicant accepted in full settlement and liquidation of all claims in respect of the injuries then or thereafter to become manifest arising directly or indirectly from the said accident and a receipt in writing for the said sum of 2*l.* was signed by the applicant.

"That the respondents intend at the hearing of the arbitration to give in evidence and rely on the following facts : that the

claim for compensation with respect to the alleged accident was not made within six months from the occurrence of the accident.

"That the respondents deny their liability to pay further compensation under the above mentioned Act in respect of the injury to the applicant mentioned in the applicant's particulars and that the grounds on which they deny their liability are those above set out."

At the hearing before the deputy county court judge witnesses were called on behalf of the applicant, but the respondents called no witnesses, and the receipt referred to in the answer was not put in evidence. On behalf of the respondents the objection was taken that the claim for compensation was not made within six months of the accident. The judge held that there was no evidence of a claim having been made within the statutory six months, and dismissed the application.

The applicant appealed.

*Evans, K.C.*, and *Dorsett*, for the applicant. The county court judge was wrong in saying that there was no evidence of a claim for compensation having been made within six months of the accident. The respondents by their answer having stated as a fact which they desired to bring to the notice of the Court that shortly after the accident they paid a sum to the applicant by way of compensation in satisfaction of all claims, the applicant is entitled to rely upon that statement as an admission that this payment was made, and that it was made by way of compensation, and that involves that a claim for compensation in some form must have been made. We admit that the claim was not in writing, but that is not necessary. There was, therefore, some evidence of a claim having been made within the six months, and the case must be remitted to the judge for a rehearing. [They referred to *Powell v. Main Colliery Co.* (1); *Wright v. John Bagnall & Sons, Ltd.* (2); and the Workmen's Compensation Rules, 1898—1900 r. 17. (3)]

(1) [1900] A. C. 366.

(2) [1900] 2 Q. B. 240.

(3) Rule 17 provides:

"(1.) If any respondent desires to disclaim any interest in the subject

matter of the arbitration, or considers that the applicant's particulars are in any respect inaccurate or incomplete, or desires to bring any fact or document to the notice of the judge,

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*Ruegg, K.C., and Shakespeare*, for the respondents. The applicant cannot rely on a part of the statement in the answer without taking the whole, and if the whole statement is taken it is an answer to the claim, because the respondents allege that the payment was made in full satisfaction of all claims. The answer occupies the same position as a pleading, and the respondents by their answer raise two inconsistent defences, as they are entitled to do—(1.) that no claim was made within the statutory period; (2.) that the claim was settled. The statements in the answer are not intended to be used by the applicant as admissions, but are merely the defences on which the respondents intended to rely. The respondents, if they had thought fit, might have withdrawn the statement on which the applicant now relies. Assuming that that statement is to be treated as an admission of payment, there is no statement that the payment was made under the Act; and further, there is no evidence that, if a claim was made, it was such a claim as would satisfy the statute. It is submitted that the claim must be in writing. There is nothing in the facts of this case to estop the respondents from setting up that the claim for compensation was

or intends to rely on the fact that notice of the accident was not served in accordance with section 2 of the Act, or that the claim for compensation was not made within the time limited by the said section, or intends to deny (wholly or partially) his liability to pay compensation under the Act, he shall, ten clear days at least before the day fixed for proceeding with the arbitration, file with the registrar an answer, stating his name and address, and the name and address of his solicitor (if any), and stating that he disclaims any interest in the subject matter of the arbitration, or stating in what respect the particulars are inaccurate or incomplete, or stating concisely any fact or document which he desires to bring to the notice of the judge, or on which he intends to rely, or the grounds on and extent to

which he denies liability.”

“(3.) Subject to any answers so filed, and to the provisions of the next following paragraph, the applicant's particulars, and in the case of a claim for compensation, the liability to pay compensation under the Act, shall be taken to be admitted.

“(4.) Provided, that in case of non-compliance with this rule, and of the applicant's not consenting at the arbitration to permit a respondent to avail himself of any matter of which he should, pursuant to this rule, have given notice by filing an answer, the judge may, on such terms as he shall think fit, either proceed with the arbitration and allow the respondent to avail himself of such matter, or adjourn the arbitration to enable the respondent to file such answer.”

not made in time: *Rendall v. Hill's Dry Docks and Engineering Co., Ltd.* (1)

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*Evans, K.C.*, in reply. *Rendall v. Hill's Dry Docks and Engineering Co., Ltd.* (1) has not been acted upon since the decision of the House of Lords in *Powell v. Main Colliery Co., Ltd.* (2) *Heaton v. Tomlinson & Co.* and *Linklater v. Webster & Son*, cited in the *Law Times* of May 7, 1904, shew that payment of compensation is some evidence of a claim having been made.

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COLLINS M.R. This is an appeal from the decision of a county court judge. The claim was made by an artisan working in certain pen works. In the course of his work on November 4, 1902, some machinery fell on his head and fractured his skull. He gave up working for a month and went to a hospital. On returning to work the effects of the accident were still apparent, and he gradually got worse, and was eventually dismissed from his employment. Then he got employment elsewhere, but found that he was not able to work, and finally he became a lunatic. In October, 1905, proceedings were commenced in the county court, and when the matter came before the county court judge the man was incapable of giving evidence, but his wife and certain other witnesses were called. Then the point was taken by the respondents that no claim for compensation was made within six months from the date of the accident, and the learned judge said that there was no evidence of a claim being made within the statutory period, and dismissed the application. Hence this appeal. The question is, whether there was or was not any evidence on which the learned judge ought to have acted of a claim having been made within the six months. If there was, the judge's mind has not been addressed to it, and the matter must be remitted to him for a rehearing. On behalf of the applicant it is said that there was such evidence, which the learned judge ought to have considered, and that that arose on the form of the documents which have to be exchanged before the initiation of proceedings in the county court. It is said that you can extract from these documents an admission debarring the respondents from setting up that a claim has not been made

(1) [1900] 2 Q. B. 245.

(2) [1900] A. C. 366.

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within the six months. By the particulars of demand which the applicant has to send in he stated that he had received from the respondents a payment of 6*l.* in respect of the injury. Then an answer to that is put in under r. 17 of the Workmen's Compensation Rules, 1898—1900; but before referring to the answer I think it is important to give the words of the rule. [The Master of the Rolls read paragraphs 1 and 3 of the rule.] The answer is headed "In the matter of an arbitration under the Workmen's Compensation Act, 1897," and it follows the form in the Appendix to the Rules. It begins by stating that the applicant's particulars were inaccurate or incomplete in stating that he had received 6*l.* from the respondents. Then comes what would appear to be a statement of the facts which the respondents desire to bring to the notice of the judge. [The Master of the Rolls read the statement as to the payment of the 2*l.*] Then comes the paragraph which raises the most material defence to the action, viz., that the claim for compensation was not made within six months from the occurrence of the accident, and finally the paragraph in which the respondents deny liability to pay any *further* compensation. Now, taking that last paragraph in conjunction with clause 3 of the rule which I have just read, the applicant's particulars must be taken to be admitted by the answer, except so far as they have been expressly stated to be inaccurate or incomplete, and taking the fact that the applicant claimed by his particulars to have received 6*l.* as compensation, and that the respondents by their answer, while denying the payment of 6*l.*, put forward the statement that on December 9, 1902, they paid to the applicant 2*l.*, which he accepted in satisfaction of all claims arising from the accident, and followed that up by a denial of liability to pay any further compensation under the Act in respect of the injury mentioned in the particulars, that involves an admission that to the extent of 2*l.* the respondents had paid to the applicant compensation in respect of their liability under the Act. Then comes the further question whether the county court judge was justified at the instance of the respondents' counsel in holding that there was no evidence of a claim having been made within six months or whether he was bound to treat the statement in the answer as an admission by the respondents that a sum had been paid in

respect of their liability under the Act to a person who had been injured by an accident and had been paid under such circumstances as to be some evidence of a claim in some form or another having been made. Before I deal with that question a little more closely, I desire to call attention to a passage in Lord Halsbury's speech in *Powell v. Main Colliery Company* (1), where he says: "I wish to say something, apart from the mere words, upon the whole of the statute itself. It appears to me that the statute deliberately and designedly avoided anything like technology. I should judge from the language and the mode in which the statute has been enacted that it contemplated what would be a horror to the mind of a lawyer, namely, that there should not be any lawyers employed at all, and that the man who was injured should be able to go himself and say, 'I claim so much,' and that then he should go to the county court judge and say, 'Now please to hear this case because my employer will not give me what I have claimed.' It appears to me that that is the meaning and construction of the whole statute, and that is what the Legislature intended, and that is the reason why it avoided any technical phrases. It strikes one at once that, if anything which to a lawyer's mind would be in the nature of a technical application or a technical commencement of the litigation was intended, the Legislature was competent, and had sufficient knowledge to say what it meant." That clearly shews that in construing this Act we are as far as possible to deal with it simply and to avoid all reference to what Lord Halsbury calls "technology." Therefore I do not think that these documents ought to be treated with the nicety of pleadings in judicial proceedings in the High Court. I think that the statute must be taken to have meant to use the simplest possible means of placing the facts before the Court. That appears on the face of the rule itself, which recognizes that the respondent may by his answer state any fact which he desires to bring to the notice of the Court. It seems to me that the paragraph beginning "on December 9, 1902," is really in the nature of particulars describing certain facts as having taken place on that date, and in my opinion upon that view the applicant is entitled

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to take that statement as an admission of those facts. Looking at the matter from that standpoint, I agree that it is unfair in a non-technical document to divorce that statement from everything else in the document, and I am prepared to take the document as a whole. It is said that that paragraph is inconsistent with the later paragraph denying any claim having been made within the six months. I do not so read it. That denial might refer to the omission of some formality supposed to be required by the Act. For instance, the respondents may have taken the view that the claim had to be in writing. On that view there is no inconsistency with that denial in the statement as to the payment of the 2*l*. But suppose, on the contrary, that the true view was that the claim need not be in writing, then there is an admission involved in the earlier statement as to a claim having been made, and an admission on which it seems to me the applicant was entitled to rely. Taking the whole of these documents, as I think we are bound to do, not as pleadings in the strict sense, but as a sort of mixture, for the purpose of this specially simplified procedure under the Act, of pleadings, particulars, and interrogatories, it seems to me that the learned judge could have extracted from the documents an admission which he was entitled to consider. I do not say that the payment of the 2*l*. was conclusive. All I say is that it was evidence of the fact that the person to whom the money was paid had made some claim. Then comes the point what was the other effect of the payment of the 2*l*. Ought it to be taken as a settlement of the claim? That is a question of mixed law and fact to be determined by the learned judge. He seems to have treated the facts relating to this payment of 2*l*. as outside his ken altogether. I think that they are matters which he ought to have taken into consideration, and therefore the case must go back to him for rehearing.

ROMER L.J. I have come to the same conclusion. I frankly admit that there are many difficulties in the way of the applicant in this case; but to my mind those difficulties are mainly of what I may call a technical character, and I think that in a proceeding such as this arbitration we ought to look at the substance of the matter, and ought not to allow technicalities to prevail. I myself

think, as the Master of the Rolls has pointed out, that the particulars of demand put in by a workman in these compensation cases and the answer put in by the employer under r. 17 ought not to be treated as if they were pleadings in the High Court or to be construed with the same strictness. I think that the Court ought to look at these documents for the purpose of gaining information. I notice particularly that under r. 17, which deals with the answer, special provision is made for the bringing to the notice of the arbitrator any facts or documents. Here undoubtedly the answer of the employers did contain a reference to certain special facts which they were insisting upon. I am not going to read that statement in detail, but I will deal with it as a matter of substance; and in substance it comes to this, that the employers were alleging that within a few weeks after the accident they paid 2*l.* to the workman by way of compensation under the Workmen's Compensation Act, 1897, and, as they say, in full settlement of all claims under the Act. That statement of fact was never withdrawn from the notice of the arbitrator. I agree that, notwithstanding that statement in the answer, it might have been open to the employers to say that they had put forward a statement like this by mistake, and that they did not desire to insist upon it. That is not the case here; they did not say that. I feel very little doubt but that it was true that 2*l.* was paid. Nor do I see why the workman should not avail himself of that while refusing to be bound by the whole statement. In that state of things I cannot see that in substance there was any real dispute of fact between the parties. That being so, there was clear evidence that a claim had been made by the workman under the Workmen's Compensation Act. Of course, if it was necessary that the claim should have been made in writing different considerations might arise. But the Act does not say that, nor that any particular formalities should be adopted, and in my opinion it is not necessary that the claim should be in writing, or attended by any formalities, provided it is a claim made under the Act. That being so, I come to the conclusion that this was a statement which the arbitrator ought to have borne in mind. It was a statement which the employers were

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C. A. putting forward and intending to rely upon. That it was  
1906 intended to be a statement of a payment under the Act is clear  
when you find the statement later on denying further liability.  
LOWE The only point that did occasion me some difficulty was the  
v. allegation that the claim was not made within six months.  
M. MYERS But I think that that must be taken to be subject to the prior  
& SONS. statement of fact, and that what was there meant was that the  
Romer L.J. employers were intending to raise the point of law that, what-  
ever the effect of the payment of the 2*l.* was, there was no such  
claim as was required by the Act. I think that it was not  
intended to affect the prior statement. That was a pure  
statement of fact, and was prefaced by the words "that the  
employers desire to bring to the notice of the arbitrator the  
following facts." Looking at the matter as one of substance,  
I think that there was evidence of a claim for compensation  
having been made within the appointed time. I therefore  
agree with the Master of the Rolls that there must be a  
rehearing.

COZENS-HARDY L.J. I am of the same opinion. I have  
nothing to add beyond this—that our decision involves the  
important point that a claim for compensation under the Act  
need not be in writing.

*Appeal allowed.*

Solicitors: *Smith Rundell & Co., for Lewis Morgan & Box,*  
*Cardiff; Hurd & Son, for W. Shakespeare, Birmingham.*

H. B. H.

[IN THE COURT OF APPEAL.]

SMITH *v.* THE STANDARD STEAM FISHING  
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May 24, 29.

*Employer and Workman—Compensation—Shipwright—Employment “in or about a Factory”—Ship in Dock—Dock Wet or Dry—“Undertakers”—“Actual Use and Occupation”—Workmen’s Compensation Act, 1897 (60 & 61 Vict. c. 37), ss. 1, 7—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 104.*

A workman employed on a ship in dock is not necessarily employed on, in, or about a “factory” within the meaning of s. 7, sub-s. 1, of the Workmen’s Compensation Act, 1897; neither does a ship in dock of necessity become a part of a dock “or of premises within the same or forming part thereof,” so as to render the owner or employer liable as the occupier of a factory, but the circumstances and purpose of the “actual use and occupation” of the dock, and the nature of the employment at the time of the accident, must be taken into consideration in each case.

In cases of this kind no true distinction can be drawn between a ship in a wet dock and a ship in a dry dock, or from the fact that the ship is actually moored to the structure of the dock.

*Houlder Line, Ltd. v. Griffin*, [1905] A. C. 220, discussed and applied. Query whether, after that decision, *Flowers v. Chambers*, [1899] 2 Q. B. 142, ought still to be treated as overruled?

BOTH these cases related to claims for compensation for injuries received by a workman while employed on a ship in dock: the nature of the employment and the facts were of much the same character in each case; the only difference being that the ship in the first case was water-borne, while in the second it was in dry dock, at the time of the accident. The Court considered the second case to be entirely covered by its previous decision in the first, but, as some further observations were made in the second with reference to some of the authorities cited, it is thought desirable that both cases should be reported, though the result of the judgments can be conveniently embodied in one head-note.

SMITH *v.* THE STANDARD STEAM FISHING COMPANY, LIMITED.

This was an appeal against the refusal of the judge of the Lincolnshire County Court to award compensation to the applicant under the Workmen’s Compensation Act, 1897.



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The applicant S. H. Smith was at the time of the accident, and had been for some years preceding it, a shipwright in the employ of the respondents, who are steam trawler owners at Great Grimsby, and used to work for them either in the workshop, on the quay, or on vessels in the dock, according to orders and as occasion might require.

On October 31, 1904, the applicant was instructed to go on board the steam trawler *Moravia*, which belonged to the respondents, to do some repairs. The vessel was moored to the jetty or landing-stage of the fish dock at Grimsby, being fastened forward by her fore rope to the jetty and aft by her aft rope to other trawlers which were lying alongside of her; the fore end touched the jetty, and the applicant went on board of her by stepping from the jetty on to the trawler.

On the morning of the accident the crew were engaged in unloading the fish from the trawler. While the applicant and two other men were pulling at a rope to get at the otter or trawl-board which the applicant was told to repair, the rope broke; the applicant fell on his back on the deck across the wheel chain pipe and broke his leg in two places.

The applicant claimed compensation, and eventually proceedings under the Workmen's Compensation Act, 1897, were taken in the Grimsby County Court. The county court judge held, on the authority of *Houlder Line, Ltd. v. Griffin* (1), that, the applicant being on board a trawler in a wet dock, and the trawler not making use of the dock in any way, the trawler was not "a factory" within the decisions under the Act, and that the respondents were not "undertakers" within the meaning of the Act, and consequently they were not liable to pay compensation.

The applicant appealed. The appeal was heard on May 24.

*Ruegg, K.C.*, and *W. H. Owen*, for the appellant. The authorities are conflicting on the point whether a ship in dock is for all purposes "a factory" within the meaning of s. 7, sub-s. 2, of the Workmen's Compensation Act, 1897. In *Flowers v. Chambers* (2), which is against the appellant, but which was disapproved in *Raine v. Jobson & Co.* (3), the man injured was in no sense a

(1) [1905] A. C. 220.

(2) [1899] 2 Q. B. 142.

(3) [1901] A. C. 404.

seaman, but simply a dock labourer. *Merrill v. Wilson, Sons & Co.* (1) and *Raine v. Jobson & Co.* (2) are in favour of the appellant; in each of those cases a workman employed on a ship in dock, who was injured, was awarded compensation. Except that in *Raine v. Jobson & Co.* (2) the ship was in a dry dock, there is no distinction between that case and the present, which is *Raine v. Jobson & Co.* (2) over again, and, had that case not been complicated by the recent decision of *Houlder Line, Ltd. v. Griffin* (3), it is clear that the appellant would have been entitled to compensation. The effect of the decision in *Raine v. Jobson & Co.* (2) was considered and applied in the recent cases of *Cattermole v. Atlantic Transport Co.* (4) and *Bartell v. W. Gray & Co.* (5), which are also in favour of the appellant. There is no distinction between work done on a ship lying in a wet dock and work done on a ship lying in a dry dock. [*Owens v. Campbell* (6) was also cited.]

*Houlder Line, Ltd. v. Griffin* (3) is distinguishable; in that case the injured man was a seaman performing the ordinary duties of a seaman, and the fact that the ship happened to be in dock waiting for the tide did not make any difference.

[ROMER L.J. In that case *Flowers v. Chambers* (7) does not appear to have been cited, and the Lord Chancellor seems to have forgotten that he had expressly dissented from *Flowers v. Chambers* (7) in *Raine v. Jobson & Co.* (2)]

There are statements in the various judgments in *Houlder Line, Ltd. v. Griffin* (3) which it is not easy to reconcile one with the other and with the previous decisions of the House of Lords.

[COLLINS M.R. I do not think that Lord Lindley could have had present in his mind the fact that *Flowers v. Chambers* (7) had in effect been overruled.]

The leading factor in *Houlder Line, Ltd. v. Griffin* (3) was that the injured man was a sailor, and the Act was not intended to apply to sailors; that decision, therefore, must not be extended. The

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(1) [1901] 1 K. B. 35.

(4) [1902] 1 K. B. 204.

(2) [1901] A. C. 404.

(5) [1902] 1 K. B. 225.

(3) [1905] A. C. 220.

(6) [1904] 2 K. B. 60.

(7) [1899] 2 Q. B. 142.

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purpose for which a ship comes into dock ought not to make any difference; whether she comes in for repairs or to discharge cargo, the result, in the case of an accident, ought to be the same. *Houlder Line, Ltd. v. Griffin* (1) was considered in *Thompson v. F. & W. Sinclair* (2), where a "rigger" who met with an accident on a ship while in dock was refused compensation. "Occupying" or "occupier" in the Factory Acts is not used in its popular sense of physical occupation; it means the person who is actually using the dock, the "occupier," is the "undertaker" who is

(1) [1905] A. C. 220.

(2) Not reported in any legal periodical. The following extract from the *Liverpool Courier* of October 28, 1905, was, however, read to the Court:—

THOMPSON v. F. & W. SINCLAIR.

"The short question was whether employment as 'rigger' on a ship while in dock was employment within the Act. The plaintiff was the representative of a deceased man, who, while employed as a rigger by the defendants on board their ship *Marabella* in the Brunswick Dock, met with his death. The deceased was bending the sails when he fell from the yardarm to the quay alongside which the ship was moored.

"On behalf of the defendants, it was contended that the plaintiff was precluded from recovering compensation under the Act by the decision of the House of Lords in the case of *Houlder Line, Ltd. v. Griffin*. In that case it was held that a sailor who met with an accident in the ordinary course of his duties while the vessel was in dock could not recover, because the ship, while in the dock, was not a factory, and the shipowners could not be held to be occupiers of a factory.

"The county court judge came to the conclusion that this case differed from that of *Houlder Line, Ltd. v.*

*Griffin*. In his opinion the defendants were in actual use of the quay against which the *Marabella* was moored, and as such must be deemed to be 'occupiers' of a factory and 'undertakers' within the meaning of the Act. He therefore made an award in plaintiff's favour. Hence this appeal.

"In giving judgment, the Master of the Rolls said he was of opinion that this case was covered by the decision of the House of Lords in *Houlder Line, Ltd. v. Griffin*, which had laid it down that a ship in a dock was not a factory. The fact that this vessel was moored alongside the quay made no difference, because the particular work upon which the deceased was engaged had nothing to do with the quay. His business was exclusively upon a ship, which, by reason of the decision of the House of Lords, could not be deemed to be a factory. The portion of the quay occupied by the ship might be a factory, but the individual must prove he was at work 'on, in, or about' the factory. The work of the deceased had no relation to the quay, and therefore the fact that the quay was a factory did not affect the position at all. The appeal must therefore be allowed with costs.

"Romer and Mathew L.JJ. concurred."

using the "factory," and Lord Macnaghten in his judgment in *Houlder Line, Ltd. v. Griffin* (1) only meant that the ship in that case was not "actually using" the dock in the Factory Acts sense of the word. In the present case the ship was moored to the quay and was using the dock to discharge fish, a state of things quite different from where a ship that has finished all dock operations and is only waiting for sea.

*A. Powell, K.C.*, and *Addington Willis*, for the respondent, were not called upon.

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COLLINS M.R., after a short statement of the facts and the nature of the appeal, continued:—The appellant is met at once by the decision in the House of Lords in the recent case of *Houlder Line, Ltd. v. Griffin*. (1) It is not, perhaps, quite easy to collect from the speeches of the learned Lords what is the essential principle which governs them all, but I think there is one common factor, or one common conclusion, in all their judgments, though whether it was arrived at by the same reasoning in each case I do not pretend to decide. I think that the majority of the learned Lords come to the conclusion that in that particular case the person sued was not the occupier of a factory, and, therefore, not an undertaker, and, therefore, that the plaintiff could not get compensation. It seems to me that this principle is common to three of the judgments in that case. Lord Halsbury says (2): "I do not think the shipowner was in any intelligible sense the occupier of the dock because his vessel was in the water surrounded by the structure of the dock." In this case this vessel was entirely water-borne, and it had no relation to the structure of the dock, excepting the fact that there was a rope used for mooring it; but the actual work which the injured man was doing had no relation whatever to the structure of the dock. He had merely walked across it for the purpose of getting on to the ship, and the work he had to do was exclusively on the ship, and had nothing whatever to do with the stone structure of the dock. Then comes Lord Macnaghten, who also, I think, bases his judgment on the same ground.

(1) [1905] A. C. 220.

(2) *Ibid.* 222



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He says (1): "It is, I think, plain, that by the expression 'dock' in the Factory Act, 1895, is meant the solid structure and body of the dock, not the water space within its limits. A corresponding meaning must be given to the word 'premises.' I do not think that a ship lying in a dock, whether afloat or not, can be included in the description of 'premises within the same or forming part thereof.' It follows, therefore, in my opinion, that the employment in which the injured person was engaged at the time of the accident was not an employment to which the Act of 1897 applies"; and he explains that a little further on by reference to *Raine v. Jobson & Co.* (2) He goes on (3): "The case of *Raine v. Jobson & Co.* (2) seems to me to be a different case altogether. There the vessel was not lying in the water space of the dock. It had been removed to and placed in a dry dock—in a berth in a dock—of which the persons sought to be made liable had the actual use and occupation." Therefore, it seems to me that he again treats the occupation as a crucial point, and holds that the persons sued in that case were not in occupation of the factory, and, therefore, not undertakers towards the plaintiff. Then Lord Lindley says (4): "To treat the owner of a ship afloat in a dock and waiting to get out to sea, as the occupier of a factory, and therefore an undertaker within the meaning of the Act, appears to me opposed to all good sense, and not to be rendered obligatory by s. 7."

It seems to me that those observations apply to this case. In fact the only difference between the two is that in this case there was no doubt a rope physically connecting the trawler with the jetty, whereas in *Houlder Line, Ltd. v. Griffin* (5) the ship was entirely disconnected from the land; but the observations as to occupation of the dock appear to me to apply equally in both cases, because the place where this man was actually employed was not on the stone structure adjacent to the water, but in the ship, which was entirely water-borne, and, therefore, I think that that principle, if it be a principle, applies as much to one case as the other.

(1) [1905] A. C. 220, at p. 224.

(3) [1905] A. C. 220, at p. 225.

(2) [1901] A. C. 404.

(4) Ibid. 228.

(5) [1905] A. C. 220.

Therefore, in my judgment, the case fails, and this appeal must be dismissed.

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ROMER L.J. I am of the same opinion. It is clear that if this trawler had been, not inside a dock, but had been lying in the river and had wanted the repair done to the trawl-board, and had sent for a carpenter to come off and do this work on board the trawler, that fact would not in itself have made the trawler a factory within the meaning of the Workmen's Compensation Act. The question is whether it makes all the difference that the carpenter came on board for the purpose of repairing the trawl-board when the trawler was afloat in the Grimsby Dock. Now it appears to me that the case is really governed by the principle of the decision in *Houlder Line, Ltd. v. Griffin* (1); for, doing the best I can (and I hope I have been successful) to extract from the judgments of the majority of the Lords who decided that case—the principles upon which they decided it—I think it appears that two principles were laid down: (1.) that seamen employed in performing their ordinary duties as seamen afloat and on board the ship were outside the general provisions of the Workmen's Compensation Act, 1897, unless, of course, there was anything special in their work to take them outside the ordinary position of seamen; and (2.) that a ship afloat in a dock does not of necessity become part of the dock or premises within the dock, so that the owner of a ship which was afloat within a wet dock would not, merely because of that circumstance, become "the person having the actual use or occupation of a dock or of any premises within the same or forming part thereof," so as to be deemed to be the occupier of a factory. You must look, as I gather from that case, to the circumstances to see whether the owners have brought themselves or not, by something special that they are doing, within the operation of the Act. I think I am right in saying that those are the two principles which are pointed out for our guidance in the case of *Houlder Line, Ltd. v. Griffin*. (1)

Now I apply them to the present case. Of course the first principle has no application, because the present workman was

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not a seaman ; but it appears to me that the second principle does apply. What are the circumstances of the case? You have here a trawler coming into the dock as a floating ship, and I cannot gather that it came in for any special purpose of being repaired, so as, by occupation of any particular part of the dock, to use its position in any way except for the purpose of floating in the dock. It may be, for all I know, that it came in merely for the purpose of discharging its fish. At any rate, nothing special is made of what it was doing inside the dock. It was floating in the water. While there it sends for a carpenter to come and repair the trawl-board. Does that circumstance alone justify us in holding that the owners of this trawler are persons having "the actual use or occupation of a dock or of any premises within the same or forming part thereof"? I think, having regard to what was said in the case in the House of Lords to which I have called attention, that we cannot say that. As my Lord has pointed out, the mere circumstance of the rope going from the bow of the vessel to the side of the dock, as it always does in these cases of trawlers discharging cargo or being temporarily in a dock, cannot make a difference. That played a wholly immaterial part in the transaction the subject of this appeal.

For these reasons I think the decision of the county court judge is right, and the appeal fails.

COZENS-HARDY L.J. I am of the same opinion. It is, in my view, extremely difficult to extract any clear logical principles from the speeches in the House of Lords in the case of *Houlder Line, Ltd. v. Griffin*. (1) On the whole, I think that the principles are those which have been stated by the Master of the Rolls and Romer L.J. I would only add this, that the distinction which was sought to be made in the present case, that here the trawler was in a sense connected with the structure of the dock by means of a rope, was really an element which existed in *Houlder Line, Ltd. v. Griffin* (1), because the vessel there was moored to a buoy in the dock. But even if I did not think, as I do, that the case is governed by *Houlder Line, Ltd. v. Griffin* (1),

(1) [1905] A. C. 220.

having had my attention called to the case of *Thompson v. F. & W. Sinclair* (1), I confess I do not think it is open to us in this Court to take any other view than that which has been taken. *Thompson v. F. & W. Sinclair* (1) was a case very much more favourable to the workman than the present case. There the vessel had been taken into the dock, she had no crew on board, and she was moored to the side of the quay ; and the county court judge thought that that distinguished the case from *Houlder Line, Ltd. v. Griffin*. (2) Nevertheless, this Court held that it was governed by the principle in *Houlder Line, Ltd. v. Griffin* (2), the vessel being really afloat in the dock, and the work in which the man was engaged not being work which referred to or involved the conduct of business on the dock or the quay.

For these reasons I think the appeal fails.

*Appeal dismissed.*

Solicitors: *F. W. Hill, for Locking & Holditch, Hull; J. C. Jackson, for W. M. Gichard, Rotherham.*

W. C. D.

#### A. M. BURDON *v.* GREGSON & Co.

This was an appeal against the refusal of the judge of the county court of Middlesex to award compensation to an applicant under the Workmen's Compensation Act, 1897.

The applicant was the widow of a workman who had been in the employment of the respondents, who were shipwrights and cold-air chamber fitters. The workman, a carpenter, was sent with other men in the employ of the respondents on board the steamship *Pioneer*, belonging to Messrs. Shaw, Savill & Co., and then lying in a dry dock, to do some repairs to the refrigerating chambers in the three holds of the ship. While engaged in this work a hatch fell on him and he was killed. The dock was hired by Messrs. Shaw, Savill & Co., and the crew of the vessel were on board and in charge at the time of the accident. The widow claimed compensation from the respondents. The county court judge did not consider the applicant was entitled to compensation.

The applicant appealed. The appeal was heard on May 29.

(1) See note (2), ante, p. 278.

(2) [1905] A. C. 220.

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*Addington Willis*, for the appellant. This case is covered by the decisions in *Merrill v. Wilson, Sons & Co.* (1) and *Raine v. Jobson & Co.* (2)

[ROMER L.J. Unless you can shew us that there is a distinction between a ship in a dry dock and a ship in a wet dock, the present case seems to me to be entirely covered by our recent decision in *Smith v. The Standard Steam Fishing Co.*]

The cases may be arranged in two classes, one relating to a ship in a wet dock, the other to a ship in a dry dock. [Counsel then proceeded to cite and examine in support of this proposition *Flowers v. Chambers* (3); *Merrill v. Wilson, Sons & Co.* (1); *Raine v. Jobson & Co.* (2); *Bartell v. W. Gray & Co.* (4); *Houlder Line, Ltd. v. Griffin* (5); *Weavings v. Kirk and Randall* (6); *Carrington v. Bannister & Co.* (7)]

*Ruegg, K.C.*, and *Shakespeare*, for the respondents, were not called upon.

COLLINS M.R., after stating the facts and observing that prior to the decision of the House of Lords in *Houlder Line, Ltd. v. Griffin* (5) the applicant in this case would have been entitled to compensation, but that having regard to that decision, the result of which the Court had considered in the previous case, the respondents in this case could not be deemed the "occupiers" of the dock where the ship was lying or of any premises therein, and after particularly referring to the judgment of Lord Macnaghten where he said (8) "I do not think that a ship lying in a dock, whether afloat or not, can be included in the description of 'premises within the same or forming part thereof,'" continued:—

Here the employers of this workman were not even in occupation, or anything like occupation, of the whole ship: they were merely persons who had sent the deceased with other workmen to deal with certain portions of the ship. Therefore they cannot, within *Houlder Line, Ltd. v. Griffin* (5), the latest authority,

(1) [1901] 1 K. B. 35.

(2) [1901] A. C. 404.

(3) [1899] 2 Q. B. 142.

(4) [1902] 1 K. B. 225.

(5) [1905] A. C. 220.

(6) [1904] 1 K. B. 213.

(7) [1901] 1 K. B. 20.

(8) [1905] A. C. 220, at p. 224.

be deemed to be occupiers of a factory, and therefore it follows that the appellant has no remedy.

I do not think it necessary to go through the cases which have resulted in this state of the law; they were all cited to us the other day, and we had to consider them, in *Smith v. The Standard Steam Fishing Co.* The only further observations I have to make on them is this, that in giving my judgment in that case I did not particularly emphasize, as I think I ought perhaps to have done, the case of *Flowers v. Chambers* (1), which was taken to have been overruled by the case of *Raine v. Jobson & Co.* (2), and which, therefore, it was necessary to refer to in order to realize the full significance of the decision in *Houlder Line, Ltd. v. Griffin*. (3) It was not merely that *Raine v. Jobson & Co.* (2) had been decided in the way it had been, but that incidentally the case of *Flowers v. Chambers* (1) had been overruled. That was the condition of the law which the House of Lords had to deal with when they came to consider the question again in *Houlder Line, Ltd. v. Griffin* (3); it may be that if the decision in *Flowers v. Chambers* (1) had been brought to their attention in that case, with the fact that they had overruled that decision, this fact might have made some difference in their attitude in the case then before them, for in the case of *Raine v. Jobson & Co.* (2) the Lord Chancellor had in terms said (4): "What difference can it make whether the respondents hired the dock, or the berth in the dock. If they hired the berth they were in the actual use or occupation of premises within the dock or forming part of it"; and twice in the course of that case the learned Lords referred to the cases of *Merrill v. Wilson, Sons & Co.* (5) and *Flowers v. Chambers* (1), and on both occasions said that they regarded those cases as inconsistent, and that they preferred *Merrill v. Wilson, Sons & Co.* (5) These two cases were addressed to what constitutes occupation of a factory and dock, and, preferring *Merrill v. Wilson, Sons & Co.* (5), they differed from *Flowers v. Chambers* (1), the inference being that *Flowers v. Chambers* (1) was wrongly decided. The point of difference

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(3) [1905] A. C. 220.

(2) [1901] A. C. 404.

(4) [1901] A. C. 408.

(5) [1901] 1 K. B. 35.

C. A. between the two cases being that *Merrill v. Wilson, Sons & Co.* (1)  
 1906 treated the occupation of a portion of a quay, not defined by  
 SMITH specific limits, but only defined by the area in use, as capable of  
 v. constituting a factory, and that the occupiers were undertakers  
 THE of it; whereas *Flowers v. Chambers* (2) had treated the owners  
 STANDARD of a ship, which was lying in a wet dock, as not being the under-  
 STEAM takers in respect of a factory, and the person in their employ  
 FISHING injured when in the ship, as not coming within the Workmen's  
 COMPANY. Compensation Act. It seems to me, as the law stood after *Raine*  
 BURDON v. *Jobson & Co.* (3), overruling as it did *Flowers v. Chambers* (2)  
 v. *Jobson & Co.* (3), overruling as it did *Flowers v. Chambers* (2)  
 GREGSON —treating *Flowers v. Chambers* (2) as differing from *Merrill v.*  
 & Co. *Wilson, Sons & Co.* (1) and preferring *Merrill v. Wilson, Sons &*  
 Collins M. R. *Co.* (1)—that if that result had been properly appreciated by  
 the House of Lords in *Houlder Line, Ltd. v. Griffin* (4), it  
 might have had some influence on their decision in that case;  
 but their decision was given without any reference to *Flowers*  
*v. Chambers* (2) and their own previous attitude towards it. That  
 does, no doubt, make it a little more difficult to apply the last  
 decision of the House of Lords and to be sure whether we ought now  
 to treat *Flowers v. Chambers* (2) as a subsisting authority, notwith-  
 standing the impression conveyed in the head-note of the report  
 of *Raine v. Jobson & Co.* (3) that it was overruled by that  
 decision. I think the principle on which the case of *Houlder*  
*Line, Ltd. v. Griffin* (4) was decided is sufficiently clear, as  
 pointed out in our decision in *Smith v. The Standard Steam*  
*Fishing Co.*, as well as in this case, and, acting on that view  
 of it, I think it disposes of this case.

In my opinion this appeal fails and ought to be dismissed.

ROMER L.J. I also think that this case is governed by our  
 decision in *Smith v. The Standard Steam Fishing Co.* I there  
 expressed my view of what I understood to be the effect of  
 the decision in the House of Lords in the case of *Houlder*  
*Line, Ltd. v. Griffin* (4), and I need not repeat what I there  
 said.

I can draw no distinction in a case like this between a ship in

(1) [1901] 1 K. B. 35.

(2) [1899] 2 Q. B. 142.

(3) [1901] A. C. 404.

(4) [1905] A. C. 220.

a wet dock and a ship in a dry dock. The employers of the workman in the present case, though the ship was in a dry dock, were not using the dry dock in any true sense as a dock. All that they had to do was to attend to some repairs inside the ship, which happened to be in a dock. It was a mere accident so far as they were concerned, that the ship happened to be in a dry dock and not in a wet dock, and as a matter of fact in the present case the evidence shews that the ship was about to go out very shortly, and that the water was being let into the dry dock for the purpose of turning it into a wet dock at the very time the accident happened to the workman employed to do the repairs inside the ship. It could not be the law that if the man had been working on the ship at the time of the accident before the water began to come into the dry dock he would have been within the Act, but that if he were doing the work after the water had come in sufficiently to lift the ship up, so that the dock might be said to be a wet dock, that then he would have been outside the Act. The fact is, as I have pointed out, for the purpose of cases like this, no true distinction can be drawn between a dry and a wet dock; nor, indeed, did the House of Lords in the case of *Houlder Line, Ltd. v. Griffin* (1) attempt to make any such distinction.

I think this case is covered by our former decision.

COZENS-HARDY L.J. I agree.

*Appeal dismissed.*

Solicitors: *R. H. Ward & Wood; W. Hurd & Son.*

(1) [1905] A. C. 220.

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## BASTAPLE v. METCALFE.

*Tramway—Carriage of Passengers—Right of Passenger to break Journey.*

A passenger on a tramcar took and paid for a ticket entitling him to travel for a certain distance; he alighted at an intermediate stopping place, walked a quarter of a mile in the direction of his destination, and got on to another tramcar, which was performing the same journey, in order to get to the point to which he might have travelled by the first car. He refused to pay the fare demanded of him on the second car, contending that he was entitled to complete his journey with his original ticket:—

*Held*, that the contract of carriage had been determined by the passenger's act, and that he was liable to be convicted for travelling on the second tramcar without paying his fare.

CASE stated by justices of Southampton.

An information had been laid by the appellant against the respondent, charging that he, being a passenger on a tramcar belonging to the corporation of Southampton, unlawfully did not pay upon demand to the conductor of the tramcar the fare legally demandable for his journey on the tramcar contrary to by-law 9 of the by-laws relating to tramways. At the hearing the following facts were admitted or proved:—

The Southampton tramways were vested in the corporation, who had made by-laws under their powers in that behalf, which were still in full force. By by-law 9 it was provided (*inter alia*) that each passenger should upon demand pay to the conductor the fare legally demandable for the journey or for the stage thereof for which it should be demanded, and should forthwith take a ticket from the conductor for the fare so paid. The 21st by-law provided for a penalty for a breach of any of the by-laws.

The corporation own all tramcars running on their tramways, and no tramcars other than theirs run thereon. Some of the cars run from Shirley to Holy Rood, and there are authorized stopping places on the route where passengers descend from, and intending passengers board, the tramcars; a tramcar coming from Shirley would (among other places) stop at the junction, and after other stopping places at a place called Above Bar and then proceed, after stopping at other places, to Holy Rood. The

appellant was the conductor of a tramcar which had started from Shirley at 11 A.M., and which the respondent boarded at 11.20 A.M. on October 21, 1905, at the stopping place at Above Bar. The appellant ascertained that the respondent wished to go to Holy Rood, and demanded from him the legal fare for that journey or stage. The respondent refused to pay the fare demanded, and produced for the conductor's inspection a tram ticket that had been issued by the conductor of another tramcar which had left Shirley not later than 9.48 A.M. on the same route, and which travelled over the same route; this ticket was not produced, the conductor stating that he had destroyed it, and the respondent denied this. The respondent said that he had boarded a tramcar from Shirley to Holy Rood at a stopping place known as West Station, between Shirley and the junction, and had paid for and obtained from the conductor of that tramcar the ticket which he produced; that he alighted at the junction, and, having walked to Above Bar, boarded the other tramcar. He also stated that he did not leave his house until after 11 A.M., and did not travel, and could not have travelled, by a car leaving Shirley not later than 9.48 A.M.

The appellant contended that, whether or not the respondent was entitled to ride from West Point to Holy Rood with the ticket which he produced upon the tramcar upon which he was when he took it, yet, by alighting at the junction and walking to the Above Bar stopping place, he had broken his journey, and had elected to terminate, and had in fact terminated, his journey at the junction. The respondent contended that, having paid the proper fare and having obtained a ticket entitling him to be carried from the West Station stopping place to Holy Rood, he was entitled to alight at the junction and complete the journey by the next tramcar. The justices by a majority upheld the respondent's contention, and dismissed the information; and the question for the Court was whether they were right in so doing.

*C. A. Russell, K.C.* (*S. H. Emanuel* with him), for the appellant. The justices should have convicted the respondent; on his own statement of the facts there was no defence to the charge. The

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tram ticket appears to have contained no reference to conditions or to by-laws, and therefore the case must depend upon the general law as regards carriage of passengers, as was the case in *Ashton v. Lancashire and Yorkshire Ry. Co.* (1) That case is conclusive; indeed, the present case is the stronger of the two in favour of the appellant's contention. It cannot be said that the respondent was constructively on board the tramcar out of which he got, as might perhaps be the case with a passenger who alights from a tramcar while waiting in order to buy a newspaper or a box of matches; here the respondent walked upwards of a quarter of a mile after leaving the first car, shewing thereby the clearest intention of discontinuing his journey.

[DARLING J. If the respondent's claim to retain the character of passenger is good, the corporation ought to reserve a seat for him in all their tramcars in case he might wish to resume his journey.]

The respondent did not appear.

LORD ALVERSTONE C.J. I am of opinion that the respondent ought to have been convicted. I express no opinion as to what might have been the result if the respondent had given to the conductor of the car a bona fide notice that his absence from the car was only to be temporary, and if such a notice had been acquiesced in by the conductor; as if, for instance, the passenger was getting down to buy something while the car was waiting. What we have to consider is what is the true view to take when a passenger, without giving notice to the conductor, gets out of a tramcar under circumstances which would ordinarily amount to a termination of his transit and then claims to proceed without further payment, not by the same car, but by another. In my view the contract was a contract to carry the respondent on that route on a particular car, and not on a succession of cars; it was not a contract which allowed him to get in and out of the cars on that route as often as he liked. The contract was determined by the respondent's own act, and the magistrates ought to have so found; the case must therefore go back to them with a direction to convict.

(1) [1904] 2 K. B. 313.

DARLING J. I am of the same opinion. I think that when the respondent took his ticket, there was a contract made between him and the tramway company by which they contracted to carry him to Holy Rood, but that the respondent might, if he chose, determine the contract by getting off the tramcar before the end of the journey. I cannot imagine that the respondent had the right to say, even with regard to the particular car by which he travelled, that he would get on and off whenever he pleased. I think that, when he became a passenger, he remained a passenger until he left the car and went away from it; I do not say that if he left it for a mere temporary purpose, such as was suggested in argument, of buying something in a shop while the car was waiting, the contract would necessarily be determined, but I am most clearly of opinion that the contract was at an end when he got off the car and allowed it to continue its journey. If he got on to another car in order to go to the place to which he originally intended to travel it would necessitate the making of a fresh contract, and he could not demand that the corporation should renew without any consideration the contract which he had himself already determined.

*Appeal allowed.*

Solicitors for appellant: *Church, Adams & Prior, for R. R. Linthorne, Town Clerk, Southampton.*

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May 29.

## THE KING v. ROWLANDS.

*Local Government—Board of Guardians—Member—Collection of Rent for the Board—Retention of Commission—Subsequent Payment to the Board—Termination of Employment—Disqualification—Vacancy—Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46, sub-ss. 1 (e), 7.*

A member of a board of guardians agreed with the board to collect on their behalf rent receivable by the board in respect of a certain house. There was no express agreement as to any fee or commission to be paid to the member for so doing. He collected the rent until the house was sold, and then paid to the board the amount of the rent received by him, less a sum which he claimed to be entitled to retain as commission, but he subsequently paid to the board the sum which he had retained. After receiving it the board declared the member's office of guardian to be vacant, on the ground that, by reason of charging commission for the collection of the rent, he had become disqualified under s. 46, sub-s. 1 (e), of the Local Government Act, 1894, for being a member of the board:—

*Held*, that the fact that before the declaration of vacancy the employment had terminated and the amount of the commission had been paid by the member to the board did not prevent him from being disqualified, and that the office was, therefore, vacant.

ORDER nisi directed to William Rowlands to shew cause why an information in the nature of a quo warranto should not be exhibited against him to shew by what authority he claimed to exercise the office of a guardian of the poor of the parish of Buckley, in the county of Flint, upon the ground that the office was full at the date of his election.

The order was granted at the instance of one Robert Wynne. The facts as stated in his affidavit were as follows:—

In the autumn of 1902 Robert Wynne, being a duly elected guardian of the poor for the parish of Buckley, in the Hawarden Union, at the request of the board of guardians agreed to collect on their behalf the rent of a cottage at Buckley which was the property of a pauper lunatic then being maintained by the guardians in the county lunatic asylum. The rent of the cottage was receivable by the board towards defraying the expenses of the maintenance of the pauper in the asylum. No agreement was made by the board with Wynne as to any fee or commission to be paid to him in respect of collecting the rent. Wynne

collected the rent for about three years, but rendered no account to the board until November 11, 1905, when, having been asked by the clerk to the board to render an account of the rent collected, as the cottage had been recently sold, he paid to the clerk the amount of the rent collected by him, less the sum of 1*l.* 2*s.* 9*d.* which he deducted for out-of-pocket expenses and commission. On December 22, in consequence of a suggestion that the retention of this sum might disqualify him as a guardian, Wynne paid it to the relieving officer for the union, who received it on behalf of the guardians.

Wynne had been a guardian continuously from 1902, having been re-elected in 1904, and his term of office would not in the ordinary course expire till March, 1907.

On January 5, 1906, at a meeting of the board of guardians, it was declared that, Wynne having become disqualified for holding the office of guardian by reason of charging commission for collection of rents for the guardians, the office of guardian lately held by him was vacant. (1)

William Rowlands was on February 3, 1906, elected to fill the office of guardian for the parish of Buckley thus declared vacant, and on February 16 he duly signed a declaration accepting the office.

The order nisi was moved for and granted on April 27, 1906.

*Scott Fox, K.C.*, and *R. V. Bankes* shewed cause against the rule. First, this is not a case for quo warranto. The proper method of raising the question as to whether Wynne's office of

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(1) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 46, sub-s. 1: "A person shall be disqualified for being elected or being a member or chairman of a council of a parish or of a district other than a borough or of a board of guardians if he— . . . (e) is concerned in any bargain or contract entered into with the council or board, or participates in the profit of any such bargain or contract or of any work done under the authority of the council or

board."

Sub-s. 7: "Where a member of a council or board of guardians becomes disqualified for holding office, . . . the council or board shall forthwith declare the office to be vacant, and signify the same by notice signed by three members and countersigned by the clerk of the council or board, and notified in such manner as the council or board direct, and the office shall thereupon become vacant."

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guardian was vacant is by an election petition against the return of Rowlands: Municipal Corporations Act, 1882, s. 87; *Pritchard v. Bangor Corporation* (1); *Hardwick v. Brown*. (2)

[LORD ALVERSTONE C.J. We are of opinion that the right procedure has been followed.]

Secondly, at the date of the election the office was vacant. By the retention of a sum for commission out of the rents collected Wynne participated in the profit of work done under the authority of the board within the meaning of s. 46, sub-s. 1 (e), of the Local Government Act, 1894, and under sub-s. 7 it became the duty of the board forthwith to declare the office vacant. This was done on January 5, and the election followed in due course on February 3. [They referred to *Nell v. Longbottom* (3); *Fletcher v. Hudson*. (4)]

*Macmorran, K.C.*, and *Brooke Little*, in support of the rule. At the date when the board declared the office vacant Wynne was not disqualified; he had handed over to the board the money which he had in the first instance retained, and his engagement with the board to collect the rent of the house had terminated, the house having been sold. Under s. 46, sub-s. 7, the declaration of vacancy must be while the disqualification exists, not after it has ceased, otherwise a guardian who has once contracted with a board would be disqualified for ever: *Lewis v. Carr*. (5) *Fletcher v. Hudson* (4) is not an authority as to the meaning of s. 46 of the Act of 1894. That case was decided under r. 64 of Sched. II. to the Public Health Act, 1875, which provides in terms that on the disqualification arising the office shall "thereupon" become vacant.

*Scott Fox, K.C.*, in reply as to the case cited. *Lewis v. Carr* (5) is not in point. It was a case under the Municipal Corporations Act, 1835, s. 28 of which provides that a person shall not be qualified to be a councillor "during such time" as he shall have any interest in a contract with the council. Sect. 46 of the Act of 1894 contains no limitation of that sort, and if the board are only entitled to declare the office vacant during the

(1) (1888) 13 App. Cas. 241.

(3) [1894] 1 Q. B. 767.

(2) (1873) L. R. 8 C. P. 406.

(4) (1881) 7 Q. B. D. 611.

(5) (1876) 1 Ex. D. 484.

continuance of the disqualification it would in many cases be impossible to do so.

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LORD ALVERSTONE, C.J. In my opinion this rule must be discharged. It is not disputed that for a time, in November and December of last year, Wynne was claiming to retain the sum of 1*l.* 2*s.* 9*d.*, for out-of-pocket expenses and commission, out of the rents collected by him for the board of guardians of which he was a member. The fact that the amount in question is small is immaterial. It is quite clear that if he accepted any commission for collecting rent for the board he would be disqualified for being a guardian. Before January 5, the date on which the guardians declared his office to be vacant, the collection of rent had ceased, the house having been sold, and he had given up his claim to be paid the commission and had handed over the money to the board, and it is contended that the disqualification had, therefore, ceased, and that the board had no power on January 5 to declare the office vacant. That, however, is not, in my opinion, the meaning of s. 46 of the Local Government Act, 1894. The section provides that a person shall be disqualified for being a member of a board of guardians if he participates in the profit of any contract or of any work done under the authority of the board. It is to be observed that the section says nothing about the disqualification continuing only during the time that the contract is in existence or the work is being done. Then sub-s. 7 of s. 46 says that when a member of a board of guardians "becomes disqualified for holding office" the board shall forthwith declare the office to be vacant. In my opinion the scheme of the Act is inconsistent with the view that the disqualification ceases with the termination of the particular contract in which the member has been interested, or that he can get rid of the disqualification by paying over to the board before the office is declared vacant the profit which he has made out of the contract. In my opinion the section means that as soon as the disqualification arises it becomes the duty of the board to declare the office vacant. If my view be correct, the case of *Lewis v. Carr* (1), which was relied on by



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Mr. Macmorran, does not assist us. That was a case in which it was sought to recover penalties from the defendant under s. 53 of the Municipal Corporations Act, 1835, for having acted as an alderman after he had become disqualified by reason of his having been interested in a contract with the council. The Court held that as s. 28 of the Act, the disqualification section, contained the words "during such time as he shall have any interest" in a contract with the council, the defendant was not disqualified within the meaning of s. 53 so as to incur penalties after the termination of the contract. But, as I have already pointed out, s. 46 of the Act of 1894 does not contain any words of limitation similar to those of s. 28 of the Act of 1835. A case very much nearer to the present is *Fletcher v. Hudson* (1), though there again the language of the rule in question, r. 64 of Sched. II. to the Public Health Act, 1875, was not quite the same as s. 46, for it provided that upon the disqualification arising the member "shall cease to be such member, and his office shall thereupon become vacant." I think, however, it may be said that the provision in sub-s. 7 of s. 46, that the board "shall forthwith declare the office to be vacant," is very nearly to the same effect as the words "shall thereupon become vacant," and, if so, *Fletcher v. Hudson* (1) may be regarded as an authority in the present case. Having regard to the difference between the language of s. 28 of the Act of 1835 and of the rule under the Public Health Act, 1875, on which *Fletcher v. Hudson* (1) turned, I cannot help thinking that it was the intention of the Legislature in framing s. 46 of the Act of 1894 to adopt the kind of legislation indicated by the rule under the Public Health Act rather than the provisions of s. 28 of the Act of 1835.

I further think that the fact that Wynne did not apply for this rule until the successful candidate at the election had acted as a guardian for two months would in any case have been a serious obstacle in the way of making the rule absolute.

RIDLEY J. I am of the same opinion.

(1) 7 Q. B. D. 611.

DARLING J. I agree, but I confess I was at first rather taken with Mr. Macmorran's argument that *Fletcher v. Hudson* (1) is not in point here, because the rule in question in that case expressly provided that the member who was concerned in a contract entered into by the board "shall cease to be a member, and his office as such shall thereupon become vacant," whereas s. 46 of the Act of 1894 says that where a member becomes disqualified the board "shall forthwith declare the office to be vacant." I think it is open to argument that under s. 46 there is no power to declare the office vacant, if, at the time of the declaration, the contract or other matter which was the cause of the disqualification has terminated, but I have come to the conclusion that, for the reasons given by my Lord, that view cannot prevail. The mischief aimed at by s. 46 is to prevent persons in the position of guardians of the poor from deriving benefit from contracts which they have to control. Now, if Mr. Macmorran's argument is right, a guardian might enter into a contract of purchase or sale with the board which might very well be completely carried out in one day. He would be disqualified, but before the board could declare his office vacant the contract would have terminated, and, therefore, according to Mr. Macmorran's argument he could not be compelled to vacate his office. This operation might be repeated daily, with the result of reducing the section to a dead letter. This leads me to think that it cannot have been intended that the termination of the contract should get rid of the disqualification.

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*Rule discharged.*

Solicitors for Rowlands: *Maples, Teesdale & Co., for Roberts, Mold.*

Solicitors for Wynne: *Lloyd-George, Roberts & Co., for John Griffiths, Chester.*

(1) 7 Q. B. D. 611.

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STEVENSON, APPELLANT; GOLDSTRAW, RESPONDENT.

STEVENSON, APPELLANT; CRAIG, RESPONDENT.

*Education Acts—Attendance—Employment of Child—By-laws—Certificate of Attendance at School—Total Exemption—Partial Exemption—Employment in Factory—Full Time—Half Time—Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), ss. 68, 71—Elementary Education Acts, 1870 (33 & 34 Vict. c. 75), s. 74; 1880 (43 & 44 Vict. c. 23), s. 4; 1899 (62 & 63 Vict. c. 13), s. 1.*

A school authority, acting under powers conferred by the Elementary Education Acts, made by-laws applicable to children up to fourteen years of age. The by-laws contained a proviso that a child between twelve and fourteen years of age should not be required to attend school, if such child had received a certificate that it had reached the sixth standard; but they contained no provision giving total exemption from the obligation to attend school to a child between twelve and fourteen who had only obtained the certificate of previous due attendance at school referred to in s. 71 of the Factory and Workshop Act, 1901:—

*Held*, that a child of thirteen years of age, who had obtained a certificate of previous due attendance, but had not received a certificate of having reached the sixth standard, could not lawfully be employed in a factory on full time.

The by-laws contained no provision for partial exemption from the obligation to attend school in the case of a child of the age of twelve who had received a certificate of previous due attendance at school:—

*Held* that, notwithstanding the absence of any such provision in the by-laws, such a child might lawfully be employed in a factory on half time, inasmuch as s. 68 of the Factory and Workshop Act, 1901, by making provision for the compulsory education of half-timers, necessarily sanctions partial exemption.

CASES stated by justices of Staffordshire.

STEVENSON *v.* GOLDSTRAW.

A complaint had been preferred by the appellant against the respondent under the by-laws of the Staffordshire County Council Education Committee, for having on May 9, 1905, neglected without reasonable excuse to cause his child, John Goldstraw, who was not less than five nor more than fourteen years of age, to attend school for the whole time required by the by-laws. At the hearing the following facts were admitted or proved:—

The appellant was a school attendance officer duly authorized

to prosecute, and the respondent was the father of John Goldstraw, who on May 9, 1905, was thirteen years and two months old. On that date John Goldstraw was absent from school; he had not attended school since March 20, 1905. Previously to the latter date he had made 350 attendances after attaining five years of age in not more than two certified efficient schools during each year for five preceding years; this was proved by the certificate signed by the principal teacher. Except in respect of those attendances there was no "reasonable excuse" for the non-attendance at school of John Goldstraw. He had not received a certificate from one of His Majesty's inspectors of schools that he had reached the sixth standard, being in fact in the fourth standard only. From March 20, 1905, he had been employed full time in a factory without a labour certificate (1), a certificate having been refused him because of the dispute in law raised by the case.

For the appellant it was contended that, inasmuch as the school attendance by-laws (2) did not provide for full time exemption on an attendance qualification, John Goldstraw must satisfy the conditions of total exemption prescribed by the

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(1) A labour certificate is granted in accordance with the provisions of clause 12 of No. 308 of the Statutory Rules and Orders, 1901. On production to the local authority of a certificate of age and *either* a certificate of proficiency *or* of school attendance, the local authority, if satisfied that the child is qualified for total or partial exemption from school attendance under the by-laws of the district, are required to furnish the certificate asked for.

(2) The school attendance by-laws of the Staffordshire County Council Education Committee provide:

"2. The parent of every child of not less than five, nor more than fourteen, years of age, shall cause such child to attend school, unless there be a reasonable excuse for non-attendance . . . .

"3. The time during which every child shall attend school shall be the whole time for which the school selected shall be opened for the instruction of children of similar age.

"4. Provided always that nothing in these by-laws— . . .

"(c) shall have any force or effect in so far as it may be contrary to anything contained in any Act for regulating the education of children employed in labour.

"5. And provided always that a child between twelve and fourteen years of age shall not be required to attend school if such child has received a certificate from one of His Majesty's inspectors of schools that it has reached the sixth standard prescribed by the Code for the time being."



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by-laws, namely, must have received a certificate of having reached the sixth standard before he could be legally employed full time in a factory or workshop.

For the respondent it was contended that, as John Goldstraw was working in a factory, he was not employed in contravention of the by-laws, such employment coming within by-law 4 (c), which followed s. 74, sub-s. 2, of the Elementary Education Act, 1870, and that he being upwards of thirteen years of age and having obtained the prescribed certificate of school attendance, had become a "young person" within the meaning of s. 71 of the Factory and Workshop Act, 1901 (1), notwithstanding that the by-laws applied to children up to fourteen years of age and that no provision was made therein for exemption by previous due attendance at a certified efficient school.

Having regard to the fact that the case of *Bury v. Cherryholm* (2) was not argued by counsel for the respondent, that

(1) Bys. 71, sub-s. 1, of the Factory and Workshop Act, 1901: "When a child of the age of thirteen years has obtained from a person authorized by the Board of Education a certificate of having attained such standard of proficiency in reading, writing and arithmetic, or such standard of previous due attendance at a certified efficient school as is mentioned in this section, that child shall be deemed to be a young person for the purposes of this Act."

By sub-s. 2: "The standards of proficiency and due attendance for the purposes of this section shall be such as may be from time to time fixed for the purposes of this Act by the Secretary of State, with the consent of the Board of Education . . ."

The standards of proficiency and due attendance are prescribed by Statutory Rule and Order, 1900 (No. 968), as follows:—

"The standard of proficiency for the purpose of a certificate of proficiency to be given to any child shall

be the fifth standard of reading, writing, and arithmetic, as fixed by the Code in force for the time being, or any higher standard which may be attained by the child."

"The standard of previous due attendance at a certified efficient school for the purpose of a certificate of previous due attendance shall, in the case of any child, be 350 attendances after such child has attained five years of age in not more than two schools during each year for five years, whether consecutive or not."

At the foot of this Statutory Rule and Order is the following:—

"*Note.*—In districts where the by-laws made by the school authority under the Elementary Education Acts apply to children between thirteen and fourteen years of age, a child must also satisfy the conditions of total exemption prescribed by the by-laws before he can be legally employed full time in a factory or workshop."

(2) (1876) 1 Ex. D. 457.

Mellor J., one of the judges in that case, was also a party to the decision in the later case of *Mellor v. Denham* (1), and that no statute had since been passed specifically altering the law on the subject, the justices determined that John Goldstraw, being upwards of thirteen years of age and having obtained a certificate of previous due attendance at a public elementary school signed by the principal teacher, was legally employed full time in a factory or workshop; they therefore dismissed the complaint.

The question for the opinion of the Court was whether, notwithstanding that the by-laws did not permit full time exemption on an attendance qualification, the said John Goldstraw, being of the age of thirteen years and having received a certificate of such standard of previous due attendance at a certified efficient school as is mentioned in s. 71 of the Factory and Workshop Act, 1901, could be legally employed full time in a factory without also satisfying the conditions of total exemption prescribed by the by-laws.

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A similar complaint was preferred under the same by-laws against the respondent Craig for having on May 9, 1905, neglected, without reasonable excuse, to cause Hannah Craig, his child, who was not less than five nor more than fourteen years of age, to attend school for the whole time required by the by-laws.

On May 9, 1905, Hannah Craig who was then twelve years and five months old, was absent from school. From March 20, 1905, to May 9, 1905, inclusive, during which time she might have attended school fifty-nine times, she was absent twenty-nine times. It was admitted that previously to March 20, 1905, she had made 300 attendances in not more than two schools during each year for five preceding years, but that no labour certificate had been granted to her because of the dispute raised by the case. Unless in respect of such attendances, there was no "reasonable excuse" for her non-attendance at school for the whole time required by the by-laws. She had not received a certificate that she had reached the sixth standard, being in fact in the third standard only. During the period from March 20.

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(1) (1879) 4 Q. B. D. 241.

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1905, to May 9, 1905, inclusive she was employed as a half-timer in a factory without a labour certificate.

For the appellant it was contended that it was not imperative that the by-laws should make any provision for partial exemption, inasmuch as the proviso in s. 74 of the Elementary Education Act, 1870, was in the alternative, namely, "that any by-law under this section requiring a child between [twelve] and [fourteen] years of age to attend school shall provide for the total or partial exemption of such child from the obligation to attend school," and that, as the by-laws provided for total exemption only and did not provide for partial exemption, Hannah Craig could not be legally employed as a half-timer in a factory notwithstanding the provisions of s. 68 of the Factory and Workshop Act, 1901 (1), and that the condition for partial exemption from school attendance contained in the proviso to s. 1 of the Elementary Education (School Attendance) Act (1893) Amendment Act, 1899 (62 & 63 Vict. c. 13) (2), did not apply where the by-laws of the district did not provide for partial exemption from school attendance, there being no statutory definition of "partial exemption."

For the respondent it was contended that, as Hannah Craig was upwards of twelve years of age, (a) she was entitled to a labour certificate and to be employed half time in a factory, as she had attended and was attending school in the manner mentioned in s. 68 of the Factory and Workshop Act, 1901; (b) that she had a statutory right to partial exemption under

(1) Sect. 68 of the Factory and Workshop Act, 1901, provides: "The parent of a child employed in a factory or workshop shall cause that child to attend some recognized efficient school (which school may be selected by the parent) as follows:—

"(a) The child, when employed in a morning or afternoon set, must in every week, during any part of which he is so employed, be caused to attend on each work day for at least one attendance; and

"(b) The child, when employed on

the alternate day system, must on each work day preceding each day of employment be caused to attend for at least two attendances . . ."

(2) The proviso is as follows:—  
 "Provided also that a child shall be entitled to obtain partial exemption from school attendance on attaining the age of twelve years if such child has made three hundred attendances in not more than two schools during each year for five preceding years whether consecutive or not."

the proviso in s. 1 of the Elementary Education (School Attendance) Act (1893) Amendment Act, 1899, notwithstanding that no provision was made in the by-laws for partial exemption.

The justices upheld the respondent's contention, and dismissed the complaint.

The questions for the opinion of the Court were whether, notwithstanding that the by-laws did not contain any provision for partial exemption, Hannah Craig—(1.) was entitled to be employed half time in a factory on attending school in accordance with s. 68 of the Factory and Workshop Act, 1901; (2.) was entitled to partial exemption under the proviso in s. 1 of the Elementary Education (School Attendance) Act (1893) Amendment Act, 1899, she having made 300 attendances in not more than two schools during each year for five preceding years.

*Disturnal*, for the appellant. In Goldstraw's case the requirements of the by-laws have not been fulfilled to enable the boy to be employed full time in a factory. The only effect of s. 71 of the Factory and Workshop Act, 1901, is to give the status of a "young person" for the purposes of that Act to a person employed in a factory. The Act contains nothing inconsistent with these by-laws, which therefore must have effect given to them: *Bury v. Cherryholm*. (1) The effect of *Mellor v. Denham* (2) has been largely qualified by s. 4 of the Elementary Education Act, 1880 (43 & 44 Vict. c. 23), which, as amended by later Acts, imposes a penalty upon a person who takes into his employment a child of eleven and under fourteen before that child has obtained a certificate of having reached the standard of education fixed by a by-law in force in the district for the total or partial exemption of children of the like age from the obligation to attend school.

In Craig's case, as no provision is made in the by-laws for partial exemption, the girl could not legally be employed as a half-timer. Under s. 74 of the Act of 1870, by which the school authority is empowered to make by-laws, it is not obligatory to create a partial exemption, and it has not been done in this case.

(1) 1 Ex. D. 457.

(2) 4 Q. B. D. 241.



1906 <hr/> STEVENSON <i>v.</i> GOLDSTRAW. STEVENSON <i>v.</i> CRAIG.	The proviso to s. 1 of the Elementary Education, &c., Act, 1899, only applies where there are no by-laws. <i>Herbert Smith</i> , for the respondents. As to Goldstraw's case, the by-laws are inconsistent with the provisions of s. 71 of the Factory and Workshop Act, 1901; they are therefore invalid, and Goldstraw, having obtained a certificate of due attendance, was exempt altogether from the obligation to attend school.
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In Craig's case there is a clear conflict between the by-laws and s. 68 of the Factory and Workshop Act, 1901, which sanctions partial exemption in the case of a child who is employed as a half-timer in a factory. The by-laws cannot override the provisions of that section or the proviso to s. 1 of the Elementary Education, &c., Act, 1899. The justices were therefore right in giving effect to the certificate of due attendance as entitling the girl Hannah Craig to partial exemption.

LORD ALVERSTONE C.J. In *Stevenson v. Goldstraw* it was argued for the respondent that the child was properly employed because, although it had not obtained a certificate of having reached a certain educational standard, it had obtained, or was entitled to, a certificate of attendance. The question is thus stated by the justices: "Whether, notwithstanding that the said by-laws do not permit full time exemption on an attendance qualification, the said John Goldstraw, being of the age of thirteen years, and having obtained a certificate of such standard of previous due attendance at a certified efficient school as is mentioned in s. 71, sub-s. 1, of the Factory and Workshop Act, 1901, can be legally employed full time in a factory without also satisfying the conditions of total exemption prescribed by the said by-laws." In my opinion this question depends upon the powers of the school attendance committee of the county council, who are the successors of the school board, under s. 74 of the Education Act, 1870. In that section there is the following proviso: "Provided that any by-law under this section requiring a child between ten and thirteen years of age"—these ages are now altered to eleven and fourteen—"to attend school shall provide for the total or partial exemption of such child from the obligation to attend school if one of Her Majesty's inspectors certifies that such child has

reached a standard of education specified in such by-law." Under s. 74 a by-law was made by the Staffordshire County Council which provided that "A child between twelve and fourteen years of age shall not be required to attend school if such child has received a certificate from one of His Majesty's inspectors of schools that it has reached the sixth standard prescribed by the Code for the time being." The child in this case, whose parent claims total exemption for him, had not obtained that certificate. It is suggested that the by-laws are invalid because they do not provide for total exemption if the child has obtained an attendance certificate, but that is going much too far. I am of opinion that where a child does not come within what I will call the express statutory protection of some other section there was under s. 74 a discretion in the school authority, as to granting total exemption, and it is impossible to say that this by-law is bad. It is quite true that by-law 4 (c) provides that "Nothing in these by-laws . . . shall have any force or effect in so far as it may be contrary to anything contained in any Act for regulating the education of children employed in labour"; and if the respondent in this case had been able to rely upon express statutory enactment in the Factory Acts very different considerations would have arisen. But he is in the position of not being able to rely upon anything except the suggested objection to the terms of the by-law, and if that by-law did not exist there would be nothing that would give him the exemption he claims. I think the justices were therefore wrong.

In *Stevenson v. Craig* the question raised is as to partial exemption, and the same arguments apply with the converse consequences. Sect. 68 of the Factory and Workshop Act, 1901, contains a provision that the parent of a child employed in a factory or workshop shall cause that child to attend some recognized efficient school; in other words, there is a statutory provision for the compulsory education of the half-timers. If there had been a by-law which enacted or provided anything inconsistent with that provision it is quite clear that the by-law would not prevail. Here the by-law refrains, and in my judgment rightly refrains, from saying anything about half-timers, for it was not attempting to deal with the question of children who were being educated

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1906      under the provisions of the Factory Act, having regard to the  
STEVENSON      fact that they were employed in a factory. The appellant is no  
v.      more entitled to say that he can rely upon a defect in the by-law  
GOLDSTRAW.      in this case than the respondent was in *Stevenson v. Goldstraw*.  
STEVENSON      When one finds that there is express statutory permission for the  
v.      employment of a child as a half-timer provided that the child is  
CRAIG.      educated in the way contemplated by the Factory Act, it seems  
Lord Alverstone      to me that the justices properly gave effect to the certificate of  
C.J.      attendance, inasmuch as the child was being educated in accordance with the scheme of the Factory Act.

DARLING J. concurred.

*Appeal in Stevenson v. Goldstraw allowed.*

*Appeal in Stevenson v. Craig dismissed.*

Solicitors for appellant: *Taylor, Rowley, Lewis & Davis, for Hand & Co., Stafford.*

Solicitors for respondents: *Sharpe, Parker & Co., for Barclay & Co., Macclesfield.*

W. J. B.

THE KING *v.* LEWIS.

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*May 2.*

*Ship—Merchant Shipping Acts—Pilot—Appeal from Pilotage Authority—  
Extension of Time for Appeal—Merchant Shipping Act, 1894 (57 & 58  
Vict. c. 60), s. 610, sub-s. 7—Pilotage Appeal Rules (Stipendiary and  
Metropolitan Police Magistrates), 1890, r. 1.*

By s. 610, sub-s. 1, of the Merchant Shipping Act, 1894, a pilot who is aggrieved by the decision of a pilotage authority may appeal to the county court judge or to a metropolitan police magistrate or stipendiary magistrate having jurisdiction within the port for which he is licensed. By s. 610, sub-s. 7, which re-enacts s. 4 of the Merchant Shipping (Pilotage) Act, 1889, power is given to the Secretary of State to make rules of procedure as respects appeals to metropolitan police magistrates and stipendiary magistrates. By r. 1 of the Pilotage Appeal Rules (Stipendiary and Metropolitan Police Magistrates), 1890, notice of appeal to a magistrate must be given to him or to his clerk and to the pilotage authority within seven days after receipt from the pilotage authority of a notification of their decision, "or within such further time as may be allowed by the magistrate":—

*Held* that, under the above rule, a magistrate has power to extend the time for giving notice of appeal, although the application for an extension of time is not made to him until after the expiration of the period of seven days within which the notice of appeal ought to have been given.

RULE for a mandamus to the stipendiary magistrate of Cardiff to hear and determine an appeal of one Jonathan Lewis against a decision of the Cardiff Pilotage Board.

It appeared from the affidavits that Lewis, a pilot, who held a pilot's licence for many years from the Cardiff Pilotage Board, gave notice to the board of his desire to surrender his licence, and requested them to fix the amount of his retiring pension. On July 5, 1905, the board fixed his retiring pension, but Lewis was dissatisfied with the amount awarded, and a long correspondence ensued, which was closed on September 6 by a letter from the board, in which they finally declined to reconsider their original decision. On September 20 Lewis made an *ex parte* application to the deputy stipendiary magistrate under r. 1 of the Pilotage Appeal Rules (Stipendiary and Metropolitan Police Magistrates), 1890 (1), for an extension of time within which to

(1) These rules, which bear date Secretary of State under powers given March 14, 1890, were made by the by s. 4 of the Merchant Shipping



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give notice of appeal, which was granted. On the day fixed for the hearing before the stipendiary the learned magistrate declined to hear the appeal on the ground that there was no jurisdiction to make an order for extension of time, the application having been made too late. The present rule was then obtained on behalf of Lewis.

*Herman Cohen*, for the pilotage board, shewed cause. There was no jurisdiction in the deputy stipendiary magistrate to extend the time for giving notice of appeal, the seven days provided for by the rule having elapsed. The rule is express that notice of appeal must be given within seven days after the receipt of the decision of the pilotage authority, unless the time is extended, and an application for extension of time must therefore be made within the seven days; if not so made, the time will have expired without any notice of appeal having been given, and without any attempt to extend the time, and the right of appeal will have lapsed through non-compliance with these necessary and specific preliminaries. It is true that in *In re Macintosh and Thomas* (1) it was held that a taxing Master had power to grant an extension of time after expiration of the time appointed by the order for taxation for the making of his certificate; but that decision proceeded upon the language of Order LXV., r. 27, sub-r. 57, in conjunction with that of the order for taxation, and there are passages in the judgments of Vaughan Williams L.J. (2) and of Romer L.J. (3) which shew that, in the absence of an express power to the contrary, the time within which an act has to be done cannot be extended after the time appointed for doing the act. In the present case such express power is wanting.

*Inskip*, for the prosecutor, in support of the rule. The rule

(Pilotage) Act, 1889, re-enacted in s. 610, sub-s. 7, of the Merchant Shipping Act, 1894. Rule 1 is as follows: "Notice of appeal to a magistrate from the decision of any pilotage authority shall be given in writing to such magistrate or his clerk, and to the pilotage authority, by the person aggrieved within seven

days after the day on which he shall have received from the pilotage authority a notification of such decision, or within such further time as may be allowed by the magistrate."

(1) [1903] 2 Ch. 394.

(2) [1903] 2 Ch. 394, at p. 405.

(3) [1903] 2 Ch. 394, at p. 407.

in question obviously allows of an application for extension of time being made, whether the seven days have elapsed or not. The present case is distinguishable from the class of cases of which *Whistler v. Hancock* (1) is an example, for there were no parties before the Court as to whom an order could be made: the action had been ordered to be dismissed for want of prosecution, unless a statement of claim was delivered within a week, and as no statement of claim was delivered within that time, the action was at an end, and there was no jurisdiction to make an order extending the time for delivering the statement of claim. But even in such a case there would be jurisdiction to extend the time for appealing against the order, even after the order had taken effect: *Carter v. Stubbs*. (2) On equitable grounds this construction should be placed upon the rule, for if the appeal had been brought, as it might have been under s. 610, sub-s. 7, of the Merchant Shipping Act, 1894, to the county court instead of to the stipendiary magistrate, the pilot would have had, under Order L., r. 22, of the County Court Rules, thirty days within which to bring his appeal, and even that period might have been extended by the Court. [He also cited *Burke v. Rooney*. (3)]

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LORD ALVERSTONE C.J. I think that we ought not to give effect to this objection to the hearing of the appeal by the magistrate. As to the rights of the appellant upon the merits I express no opinion; the only ground of the present application is that the magistrate stopped the appeal because it was out of time. With regard to the suggestion that, if the application is not made to the magistrate within seven days the time for appealing will be extended without limit, with the result that any number of appeals may be brought against the decisions of pilotage authorities, the answer is, as was pointed out by the learned counsel who supported the rule, that in any event it is necessary to get the leave of the magistrate, and that where there has been great delay he would not, in the exercise of his discretion, grant the application. In the present case the delay was only from September 6 to September 20.

(1) (1878) 3 Q. B. D. 83.

(2) (1880) 6 Q. B. D. 116.

(3) (1879) 4 C. P. D. 226.

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The question for our decision really turns upon the proper construction of r. 1; are we to hold that the principle which has in many cases been held to govern the question of an extension of time after the original time limit has expired applies to this particular rule? In the case of *In re Macintosh and Thomas* (1), which is the most favourable to the contention of the pilotage board, the question arose upon the words "extending the time," and both Vaughan Williams L.J. and Romer L.J. seem to have thought that, but for further power, the time could not have been extended after it had once expired, and they relied upon the general power to extend the time after the expiration of the original time limit as curing all difficulties. I do not quite agree with the contention on the other side that the decision of Lord Coleridge C.J. in *Burke v. Rooney* (2) is an authority in their favour further than that it is a very indirect expression of opinion; the ultimate decision in that case also was based upon the existence of another rule. In the present case we have to deal with a code of rules which is entirely self-contained; the rules are drawn in somewhat less precise language than usual, and undoubtedly give rise to some ambiguity. Rule 1 is in these terms: "Notice of appeal to a magistrate from the decision of any pilotage authority shall be given in writing to such magistrate or his clerk, and to the pilotage authority, by the person aggrieved within seven days after the day on which he shall have received from the pilotage authority a notification of such decision, or within such further time as may be allowed by the magistrate." Except in the one case where a party who is doubtful whether he will appeal goes to the magistrate and applies for an extension of time to enable him to decide, no meaning has been given to the language of the rule unless the contention on behalf of the pilot is correct. I think that the notices given to the magistrate and to the pilotage authority respectively should be contemporaneous, and that it was intended that the magistrate should have power to extend the time for giving notice to himself as well as to the pilotage authority. It would hardly be reasonable to suppose that the magistrate's power to extend the time should be limited to

(1) [1903] 2 Ch. 394.

(2) 4 C. P. D. 226.

applications made to him within the original period of seven days, for if the party aggrieved comes before the magistrate within seven days he can give notice of appeal to the magistrate on the spot, and extension of time would not be wanted. The construction, therefore, that I put upon this rule is that it was intended that the magistrate should have power to extend the time for giving notice of appeal to himself, and, if so, he might clearly extend the time for giving notice to the pilotage authority. If our decision is wrong, it will not prevent the point being raised if an attempt is made to enforce the award, but upon the best consideration that I can give to the construction of this rule I think that the objection taken by the learned magistrate was wrong, and that the leave to appeal originally given by the deputy stipendiary magistrate was right.

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RIDLEY J. I agree. I have certainly felt some difficulty as to what I understand to be the effect of Order LIV., r. 21, of the Supreme Court Rules, where the language used is very similar to that in the rule under consideration, viz., "such further time as may be allowed by a judge or Master." I have certainly thought that, but for the existence of Order LXIV., r. 7, there would not be, under the rule I have cited, power to extend the time after the expiration of the first period of time for making the application; but I think that my Lord has given cogent reasons for giving a wider construction to the present rule, and I agree with the judgment which he has delivered.

DARLING J. I am of the same opinion, and I come to the conclusion at which I have arrived because the rule under consideration is a very peculiar rule, and bears but little resemblance to the rules in the cases which have been cited to us. The rule provides that a pilot who is dissatisfied with a decision of the pilotage authority shall give notice of appeal, not only to the pilotage authority with whose decision he quarrels, but also to the magistrate who is to hear the appeal. If the argument for the pilotage board is correct, and if the magistrate can only extend the time provided application is made to him before the expiration of the period of seven days, this would result: the pilot would come within the seven days before the magistrate,



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and would say that he was desirous that his time for appealing should be extended; and if the magistrate declined to extend the time, the pilot would at once, and in court, give him notice of appeal, and would then go off and give a similar notice to the pilotage authority. If that were the proper construction, the rule would be reduced to such minute proportions that it would hardly be worth while to make it.

*Rule absolute.*

Solicitors for pilotage board: *Bower, Cotton & Bower, for Stephens, David & Co., Cardiff.*

Solicitors for prosecutor: *Downing, Handcock, Middleton & Lewis, for Downing & Handcock, Cardiff.*

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May 4.

# LONDON COUNTY COUNCIL v. GREAT EASTERN RAILWAY COMPANY.

*Railway—Engines—Consumption of Smoke “as far as practicable”—Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 114—Regulation of Railways Act, 1868 (31 & 32 Vict. c. 119), s. 19.*

By s. 114 of the Railways Clauses Consolidation Act, 1845, a railway locomotive engine using coal, or similar fuel emitting smoke, must be constructed on the principle of consuming and so as to consume its own smoke, and a penalty is attached to the user of an engine not so constructed. By s. 19 of the Regulation of Railways Act, 1868, it is made an offence under s. 114 if an engine, although constructed on the principle of consuming its own smoke, fails to do so, as far as practicable, through the default of the company or its servants.

An engine of the respondents, properly constructed on the principle of consuming its own smoke, emitted dark smoke for a short time while running on their railway on two occasions at an interval of rather more than an hour; the smoke was not emitted through any default in the stoking or management of the engine. The coal used was of a bituminous character, and was a good hard steam coal, and was the normal locomotive coal in use in some districts. If Welsh coal, which was twice as costly, had been used, less smoke would have been emitted:—

*Held*, that the engine had not failed to consume its own smoke as far as practicable through any default of the railway company within the meaning of s. 114 of the Railways Clauses Consolidation Act, 1845, as amended by s. 19 of the Regulation of Railways Act, 1868.

CASE stated by a metropolitan police magistrate.

The respondents had been summoned to answer an information

laid by the appellants charging that on July 8, 1905, at Bethnal Green Junction, the respondents used upon their railway a locomotive steam engine using coal or other similar fuel emitting smoke, and not then constructed on the principle of consuming and so as to consume its own smoke, and which did not then consume its own smoke. At the hearing the following facts were proved :—

On July 8, 1905, a coal officer of the appellants was watching near the Bethnal Green Junction Station, when a passenger train of the respondents drawn by the engine in question came into view at 6.22 A.M. from the direction of Liverpool Street, drew up at Bethnal Green Junction, and passed out of view at 6.24 A.M. On the same morning at 7.47 A.M. the same engine came into view hauling a similar train, which stopped at Bethnal Green Junction, and passed out of view at 7.49 A.M.; during a portion of each of the periods of two minutes the engine was emitting dark smoke. The engine was a properly constructed engine, and was constructed on the principle of consuming, as far as practicable, the smoke of the coal then in use upon it; the coal was a Derbyshire or Yorkshire coal of a bituminous character, and it was a good hard steam coal, and was the normal locomotive coal in use in some districts. It was not through the default of any servant of the respondents in the stoking or management of the engine that any smoke was emitted.

It was further proved that on the East London line, over which the respondents had running powers, the respondents were under an obligation to employ, and did employ, on their engines a Welsh smokeless steam coal, different from the coal used on the engine in question. The Welsh coal produced smoke not so dark as that of the coal used in the engine in question, and not so much in proportion to the amount of coal used as was produced by the Derbyshire or Yorkshire coal. The engine as constructed could have used similar Welsh coal, and if that had been done less smoke would have been emitted. The Welsh coal cost the respondents about twice as much as the coal used on the occasion complained of, and the greater expense was the principal reason why it was not used in the engine in question.

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It was contended by the appellants that s. 19 of the Regulation of Railways Act, 1868, specially amended s. 114 of the Railways Clauses Consolidation Act, 1845, and that, whereas the earlier Act only required that an engine should be constructed on the principle of consuming its own smoke, the amending Act required that it should in fact consume its own smoke as far as practicable, and that, as the object of the two sections was to require engines to be so constructed and used as to emit as little smoke as possible and the engine in question had failed to consume its own smoke, the respondents were guilty of the offence charged. The appellants further contended that upon the true construction of these sections the respondents were guilty of the offence charged, in that they had used upon the engine a bituminous coal, which necessarily produced dark smoke beyond the power of the engine in question as constructed to consume, when by using smokeless Welsh coal they could have avoided emitting such smoke from the engine as was seen by the appellants' witnesses, and that such user of bituminous coal by the respondents was a default on their part within the meaning of s. 19 of the Regulation of Railways Act, 1868.

The respondents contended that, provided their engine was constructed on the principle of consuming and so as to consume, as far as practicable, the smoke of the coal actually used upon it, and provided there was no negligence in the stoking or management of the engine with that coal, they were under no obligation to use any particular coal, and were not guilty of any default within the meaning of the Acts in not doing so.

The learned magistrate was of opinion :—

(a) That the engine was properly constructed within the meaning of s. 114 of the Railways Clauses Consolidation Act, 1845.

(b) That it did not fail to consume its own smoke so far as was practicable having regard to the coal which was used.

(c) That the use of the coal that was in fact used was not a default of the respondents within the meaning of s. 19 of the Regulation of Railways Act, 1868, and that there was no other default.

(d) That the smoke emitted by the engine was of a darker

colour and slightly more in quantity than would have been emitted if Welsh coal had been used.

The magistrate dismissed the summons.

The question for the opinion of the Court was whether the learned magistrate was right in law in his decision on the above facts, or whether he was bound in law to hold that the use of a coal producing a dark smoke, and more smoke than would have been produced by the use of a different coal, was a default on the part of the respondents.

*Bodkin*, for the appellants. The magistrate should have convicted. It is a default on the part of a railway company to supply a class of coal for consumption in their engines which makes more smoke than the engine, if properly constructed, can consume, at any rate in cases where it is possible to use other coal which makes less smoke. The original intention of the Legislature, as shewn in s. 114 of the Railways Clauses Consolidation Act, 1845, was that engines should be constructed to consume, and should consume, their own smoke. Then by s. 19 of the Regulation of Railways Act, 1868, it was made an offence under s. 114 of the earlier Act for an engine to fail to consume its own smoke "as far as practicable," even though it was properly constructed with a view to consuming its own smoke. (1) The latter section was passed in consequence of

(1) By 8 & 9 Vict. c. 20 (the Railways Clauses Consolidation Act, 1845), s. 114: "Every locomotive steam engine to be used on the railway shall, if it use coal or other similar fuel emitting smoke, be constructed on the principle of consuming and so as to consume its own smoke; and if any engine be not so constructed, the company or party using such engine shall forfeit five pounds for every day during which such engine shall be used on the railway."

By 31 & 32 Vict. c. 119 (the Regulation of Railways Act, 1868), s. 19: "Where proceedings are taken against a company using a loco-

motive steam engine on a railway on account of the same not consuming its own smoke, then if it appears to the justices before whom the complaint is heard that the engine is constructed on the principle of consuming its own smoke, but that it failed to consume its own smoke, as far as practicable, at the time charged in the complaint through the default of the company, or of any servant in the employment of the company, such company shall be deemed guilty of an offence under the Railways Clauses Consolidation Act, 1845, section one hundred and fourteen."

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the decision in *Manchester, Sheffield and Lincolnshire Ry. Co. v. Wool* (1), where it was held that the penalty under s. 114 only attached where the non-consumption of smoke arose from the defective construction of the engine, and not where it was the consequence of the negligent user or management of a properly constructed engine. Under s. 114 of the Act of 1845, as amended by s. 19 of the Act of 1868, it was held in *South Eastern and Chatham Ry. Co. v. London County Council* (2) to be an offence for a properly constructed engine to emit black smoke from smoky coal for an unnecessarily long time, Lord Alverstone C.J. saying in the course of his judgment: "I do think the statute meant under ordinary circumstances no smoke should come out." The gravamen of the offence is that, although the engine itself is properly constructed, there is a default on the part of the railway company or its servants. The only defaults dealt with by the section are the construction of the engine itself, the quality of the fuel, and the negligence of the company's servants. The first and last of these are expressly negatived by the findings in the case, and the case is narrowed down to the question whether the use of this class of fuel, which produced more smoke than a properly constructed engine could consume, was an offence. The obligation on the company is that their engine, being properly constructed, shall consume its own smoke "as far as practicable"; some meaning must be given to the last words, and it is submitted that they mean that the company's engines must consume their own smoke as far as possible, consistently with the carrying on by the railway company of their ordinary business: see *Cooper v. Woolley*. (3) It is no answer on the part of the railway company to say that the use of smokeless coal would be more expensive: *Patterson v. Chamber Colliery* (4); the company are bound to use the best coal practicable from the point of view of smokelessness, and they do not fulfil their obligation if they use a bituminous coal which, as they know, necessarily produces smoke. [He also cited *Smith v. Midland Ry. Co.* (5)]

(1) (1859) 2 E. & E. 344.

(2) (1901) 84 L. T. 632.

(3) (1867) L. R. 2 Ex. 88.

(4) (1892) 56 J. P. 200.

(5) (1877) 37 L. T. 224.

*Arory, K.C. (J. P. Grain with him)*, for the respondents. There was no default of the railway company within the meaning of s. 19 of the Act of 1868. The present case is essentially different from *South Eastern and Chatham Ry. Co. v. London County Council* (1); there it was held that there was evidence of the emission of black smoke from the engine for three minutes at a time, and there was also evidence that, if the engine was properly constructed, there was no necessity to emit smoke for so long a period, even if bituminous coal were used. There is no statutory obligation on railway companies to use best coal or Welsh coal; in fact, s. 114 of the Act of 1845 contemplates their using a fuel which does emit smoke.

[He was stopped by the Court.]

LORD ALVERSTONE C.J. I am of opinion that this appeal should be dismissed. It has been ingeniously argued for the appellants that the effect of the amendment of the old section is indirectly to impose upon railway companies an obligation to use coal of the highest quality from the point of view of smokelessness. In my opinion that is going a great deal too far, and I am not prepared to say that the learned magistrate, who held on the particular circumstances of this case that there had been no default on the part of the respondents, came to a wrong conclusion upon a question of fact. It is true that s. 114 of the Act of 1845 provides that an engine using coal or other fuel emitting smoke shall be constructed on the principle of consuming and so as to consume its own smoke. At that date the state of knowledge on the subject was less than it was twenty-five years afterwards when the amending Act was passed, but it was obviously contemplated that engines might be either well or badly constructed, and that they could be so well constructed as to consume their own smoke. Under the Act of 1845 the case of *Manchester, Sheffield and Lincolnshire Ry. Co. v. Wood* (2), was decided, and it was there pointed out that in order to justify proceedings under s. 114 there must be proof that the engine was improperly constructed, and that it was not sufficient to shew that the emission of smoke was due to the negligence of a servant. In that state of things it was provided

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(1) 84 L. T. 632.

(2) 2 E. & E. 344.

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by s. 19 of the Act of 1868 that if it appears to the justices before whom the complaint is heard that the engine is constructed on the principle of consuming its own smoke, but that it fails to consume its own smoke, as far as practicable, at the time charged in the complaint through the default of the company, the company is to be deemed guilty of an offence under s. 114 of the earlier Act. That section, therefore, clearly contemplates that some coal which emits smoke will still be used. If the appellants had been able to shew that the respondents might without any difficulty have provided coal for their engines which emitted no smoke at all, some argument might possibly have been based upon that fact in the course of the proceedings before the magistrate. I do not think that such an argument could be used in this Court, but it is not unimportant to observe that the finding of the magistrate on both parts of the case is that the smoke emitted by the engine was of a darker colour and slightly more in quantity than would have been the case if Welsh coal had been used. For the purpose of this particular case we have nothing to do with the colour of the smoke except so far as it might perhaps in some cases afford evidence of bad stoking or of the emission of an undue quantity of smoke; all, however, that the learned magistrate can say on the point is that the smoke from Welsh coal would have been slightly less in quantity. Is the section to be so construed as to impose upon the railway company the obligation of using only the class of coal which produces the least smoke? I feel sure that, if that had been the intention of the section, there would have been a great conflict of evidence as to what coal does produce the smallest quantity of smoke, and the question would be even more difficult. In my opinion the expression "fails to consume its own smoke, as far as practicable, at the time charged in the complaint through the default of the company" points, in the first instance, substantially to a default in the construction of the engine or in not providing proper coal for the particular engine, and not to a default in not providing the best coal. I need say nothing as to default of a servant, for no such default is alleged in the present case. The magistrate has found that the engine was perfectly

properly constructed, and that the coal used was a good hard steam coal, and was the normal locomotive coal in use in some districts; by normal locomotive coal I understand coal which is as a rule used to a very large extent by other railway companies for their locomotive engines. It is true that there is in the case a finding that for some contractual reasons the respondents have undertaken to use Welsh smokeless coal on the East London line. But it is plain that contractual obligations of a railway company cannot operate to extend in all cases their statutory obligations under the Act of Parliament, and this led me to ask whether or not that bargain depended on anything that would throw light on the particular question we are considering. It may be a matter requiring further consideration, but it seems clear to me that we should be placing a wrong construction upon the statute if we were to say that the respondents have been guilty of a default because they have not used the particular kind of coal, which in this case has been picked out as a coal producing less smoke than the coal actually used. I think, therefore, that the learned magistrate arrived at a right conclusion, and that, whether he did so or not, he made no mistake in law upon which we can properly reverse his decision; for if we allowed this appeal we should have to say, not that so far as practicable the respondents have been using an engine so as to consume its own smoke, but that they must use coal, whatever may be its cost, and however difficult it may be to procure it, which does in fact produce less smoke than the particular coal used on the particular occasion.

DARLING J. I am of the same opinion. I think that the appellants' counsel put his argument best when he contended that a company is bound to provide an engine which shall, as far as practicable, consume its own smoke; that is perfectly correct. But then the learned counsel went on to say that a company is bound to provide the fuel which will permit the engine, as far as practicable, to consume its own smoke; and that contention he has, in my opinion, failed to establish. The statute might have expressly laid that down in the plain language used by the learned counsel, but it has not done

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so, and the case presented by the appellants is narrowed down to this small point, that it is an offence to burn, even in the best constructed locomotive, anything but anthracite coal, probably from Wales, because that is the coal which gives off the least smoke, and which therefore enables the engine to use to the greatest possible extent its power of consuming its own smoke. In my opinion the fact that the Legislature has not laid this down in plain words is strong evidence to shew their intention, which seems to have been this : that these locomotives must be used in various parts of the country just as manufactories must. and that a similar doctrine as to the smoke nuisance is to be applied in the one case as in the other. Of course, in any case the nuisance of diffusing smoke in the air is not to be permitted if it is avoidable by the use of reasonable means which will not unduly hamper the industry, and if the contention of the appellants is sound as regards locomotive engines, it is equally applicable to manufactories, and it would amount to this : that local coal, except in that small area where anthracite coal exists, could never be used either in locomotives or in manufactories. I do not think that this can have been the intention of the Legislature. In my opinion the statute has been complied with when a man has constructed an engine which, given the use of a coal in all circumstances reasonable to use, will consume, as far as practicable, the smoke which that coal will necessarily give off. Even if the engine is of the best construction, the coal of the best quality, and the engine fired in the best possible way, all the smoke will not be consumed ; but the interpretation which we are invited by the appellants to place upon s. 114 of the Act of 1845 would, if it is a sound contention, compel us to hold that an offence had been committed every time that the smoke had not been consumed. Such a construction of the legislative enactments seems to me impossible. I think that the Act of 1868 effected a certain relaxation of the law, and I entirely agree with the judgment of my Lord in his interpretation of the law on the subject as it at present stands.

*Appeal dismissed.*

Solicitor for appellants : *Seager Berry.*

Solicitor for respondents : *E. Moore.*

W. J. B.

## WHEATLEY v. SMITHERS.

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May 24.

*Auctioneer—Partnership—Bill of Exchange—Implied Authority to accept—Trader.*

An auctioneer is not a trader, and a partner in a firm of auctioneers has no implied authority to bind the firm by his acceptance of a bill of exchange in the firm name.

APPEAL from the City of London Court.

The action was brought on a bill of exchange accepted by the defendant's partner in the firm name. The business carried on by the defendant and his partner was that of auctioneers. The judge found as a fact that the bill had been accepted in respect of a matter outside the partnership business, and he held that the partnership was not a trading partnership, and that one partner had, therefore, no implied power to bind the other by his acceptance. The judge on these grounds gave judgment for the defendant.

The plaintiff appealed.

*A. Cairns*, for the plaintiff. The county court judge was wrong in holding that the partnership was not a trading partnership. An auctioneer carries on a trade. He sells goods, though they are not his own. He is not in the same category as professional men or farmers. There is no direct authority on the point, but auctioneers are included amongst the persons described as traders in the schedule to the Bankruptcy Act, 1869, and a company formed for the purpose of, amongst other things, buying and selling land has been held to be a trading company, and as such to have an implied power to borrow money: *General Auction Estate and Monetary Co. v. Smith* (1); *Bryon v. Metropolitan Saloon Omnibus Co.* (2); *In re General Estates Co., Ex parte City Bank* (3); *Palmer's Company Law*, 4th ed. p. 221.

*E. G. Palmer*, for the defendant, was not called upon to argue.

(1) [1891] 3 Ch. 432.

(2) (1858) 3 De G. & J. 123.

(3) (1868) L. R. 3 Ch. 758.

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RIDLEY J. In my opinion this appeal fails. The learned judge of the City of London Court has held that auctioneers are not traders for the purpose of the law relating to bills of exchange. I am not prepared to say that he was wrong in so deciding. Counsel for the plaintiff has not been able to cite any authority in which it has been held that auctioneers are traders within the meaning of the rule that a trader has implied authority to bind his partner by his acceptance of a bill of exchange. It is true that in the schedule to the Bankruptcy Act, 1869, auctioneers are included in a list of persons who are to be considered to be traders for the purpose of that Act, but I do not agree that it follows from that that an auctioneer is for all purposes a trader. I do not propose to attempt to give an exhaustive definition of what constitutes a trader, but I think that one important element in any definition of the term would be that trading implies a buying or selling. An auctioneer does not buy; he does sell, but not his own goods, only those of other persons. If, therefore, buying and selling are essential features of trading, an auctioneer does not come within the definition. This distinction is supported by the judgment of Willes J. in *Harris v. Amery* (1), where, in pointing out the difference between trade and business, he said: "It is unnecessary to refer to authorities to shew that 'business' has a more extensive signification than 'trade.' The earlier Bankrupt Acts did not embrace farmers; but it was never doubted that farming was a 'business' though not a 'trade.' Banking is not strictly a trade." It is to be observed that bankers as well as auctioneers are included in the description of traders in the schedule to the Bankruptcy Act, 1869. In my opinion an auctioneer, like a banker, carries on a business, but he is not a trader.

The appeal must, therefore, be dismissed.

DARLING J. I am of the same opinion.

*Appeal dismissed.*

Solicitor for plaintiff: *W. J. Smith.*

Solicitors for defendant: *Downer & Johnson.*

(1) (1865) L. R. 1 C. P. 148, at p. 154.

## WATTS, APPELLANT; STEVENS, RESPONDENT.

1906

May 28, 29.

*Adulteration—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25—  
Milk—Written Warranty—Future Deliveries—Evidence in Writing to  
connect Particular Consignment with Warranty.*

In August, 1905, a farmer contracted to supply the respondent with milk, and gave to the respondent a letter stating that he guaranteed that the milk supplied by him to the respondent was perfectly pure and with all its cream. In December, 1905, milk was consigned to the respondent by the farmer and delivered to him under the contract, and the respondent subsequently sold a pint of that milk to the appellant as and for new milk, which upon analysis was found to contain 16 per cent. of added water. On an information against the respondent for having, contrary to the provisions of the Sale of Food and Drugs Act, 1875, sold the milk not being of the nature, substance, and quality demanded by the appellant, the respondent relied on the warranty contained in the letter as a defence under s. 25 of the Act:—

*Held*, that a warranty relating to goods not in existence when the warranty is given may be a good warranty within s. 25; but *held* by Lord Alverstone C.J. and Darling J. (Ridley J. dissenting) that, in the absence of any evidence in writing connecting the particular milk sold to the appellant with the warranty, the warranty afforded no defence to the respondent.

*Harris v. May*, (1883) 12 Q. B. D. 97; *Laidlaw v. Wilson*, [1894] 1 Q. B. 74; and *Robertson v. Harris*, [1900] 2 Q. B. 117, followed. *Elliot v. Pilcher*, [1901] 2 K. B. 817, not followed.

CASE stated by justices.

An information was preferred by the appellant, an inspector of food and drugs, against the respondent for that the respondent on December 23, 1905, at the parish of Ruislip, in the county of Middlesex, did unlawfully sell to the appellant to his prejudice a certain article of food, to wit, new milk, which was not of the nature, substance, and quality demanded by the appellant, the purchaser thereof, but was new milk containing 16 per cent. of added water.

Upon the hearing of the information the following facts were admitted or proved in evidence:—

On December 28, 1905, the appellant entered the respondent's shop and asked to be served with a pint of new milk, and the respondent sold to the appellant one pint of new milk which



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contained 16 per cent. of added water. The milk in question had been supplied to the respondent by one Francis Mott, a farmer, under a contract made in or about August, 1905.

On August 5, 1905, after the making of the contract, but before the delivery of any milk thereunder, Mott had given or sent to the respondent a letter in the following terms:—

“August, 5, 1905. I guarantee that the milk supplied by me to Mr. Stevens is perfectly pure and with all its cream as the cow gives it. (Signed) Francis Mott.”

Both Mott and the respondent intended that to be a continuing warranty. The milk which was sold to the appellant on December 28, 1905, had not been purchased with any warranty except in so far as the above letter constituted a warranty of that milk.

It was contended on behalf of the appellant that the letter was not a warranty of the milk purchased, out of which one pint was sold to the appellant, within s. 25 of the Sale of Food and Drugs Act, 1875 (1); that there was no evidence that the respondent had purchased the milk in question as the same in nature, substance, and quality as that demanded of him by the appellant, or that the respondent had so purchased it with a written warranty to that effect.

It was contended on behalf of the respondent that the letter covered the milk sold on December 28, 1905, and was a sufficient warranty of that milk within s. 25 of the said Act.

The justices were of opinion that the letter of August 5, 1905, was intended by both parties to cover the delivery of milk of which one pint was sold on December 28, 1905, and they dismissed the information.

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25: “If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor, and with a written warranty to that effect, that

he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution, but shall be liable to pay the costs incurred by the prosecutor, unless he shall have given due notice to him that he will rely on the above defence.”

The question for the opinion of the Court was whether upon the above facts the justices came to a correct determination in point of law.

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*Eustace Hills*, for the appellant. The facts proved do not entitle the respondent to the protection afforded by s. 25 of the Act. The warranty relied on was given in August, and the milk in question was not delivered until the following December. A warranty relating to future deliveries is not a good warranty within s. 25: *Robertson v. Harris* (1), per Darling J. citing Blackstone's Commentaries on the Laws of England, 1st ed. vol. iii. p. 165 [166 in the marginal paging used for reference in the twelfth (2) and subsequent editions]. If a warranty relating to future deliveries can in law be a good warranty, it is necessary in order to satisfy the requirements of s. 25 that there should be some written evidence connecting the particular consignment of goods with the warranty: *Harris v. May* (2); *Laidlaw v. Wilson* (3); *Robertson v. Harris*. (1) In *Elliot v. Pilcher* (4) it was held that a warranty under s. 25 is no defence to a prosecution under s. 9 of the Act; but the Court (Bigham and Ridley JJ.) also discussed *Harris v. May* (2), and came to the conclusion that it was wrongly decided. For the purpose of deciding *Elliot v. Pilcher* (4) it was unnecessary to consider *Harris v. May* (2), and the observations made with regard to that case were merely obiter. In the present case, in the absence of any evidence in writing connecting the milk sold to the appellant with the warranty, the respondent should have been convicted. [He also referred to *Beattie v. Lord Ebury* (5); *Hopkins v. Tanqueray*. (6)]

*Douglas Hogg*, for the respondent. A warranty is good in law although it relates to goods which were not in existence at the time the warranty was given: *Liddard v. Kain* (7); *Brown v. Edgington*. (8) The passage in Blackstone's Commentaries cited by Darling J. in *Robertson v. Harris* (1) was an accurate statement of the law at the time Blackstone wrote, because

(1) [1900] 2 Q. B. 117.

(2) 12 Q. B. D. 97.

(3) [1894] 1 Q. B. 74.

(4) [1901] 2 K. B. 817.

(5) (1872) 41 L. J. (Ch.) 804.

(6) (1854) 15 C. B. 130.

(7) (1824) 2 Bing. 183.

(8) (1841) 2 M. &amp; G. 279.

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the mode of proceeding on a breach of warranty then was by an action of deceit, but subsequently it became the practice to declare in assumpsit, and there was then no difficulty with regard to a warranty of future goods: *Williamson v. Allison* (1); Smith's Mercantile Law, 5th ed. p. 492; Blackstone's Commentaries, 16th ed. (published in 1825, with notes by John Taylor Coleridge) vol. iii. p. 166, note 21. It is not necessary in order to satisfy s. 25 of the Act that there should be some writing connecting the goods with the warranty. Verbal evidence is sufficient: *Bacon v. Callow Park Dairy Co.* (2) The necessity for some written evidence was first suggested by Charles J. in *Laidlaw v. Wilson* (3) as a possible explanation of *Harris v. May* (4); but, as Bigham J. pointed out in *Elliot v. Pilcher* (5), there is nothing in the judgment of Lord Coleridge C.J. in *Harris v. May* (4) to justify the assumption that he meant to decide that. What *Harris v. May* (4) did decide was that there must be a separate specific warranty with regard to each consignment of goods. It is submitted that that is wrong and the decision ought not to be followed. Wright J. in *Laidlaw v. Wilson* (3) did not refer to the necessity for some writing connecting the goods with the warranty. *Farmers and Cleveland Dairy Co. v. Stevenson* (6), according to the report in the *Law Journal*, points in the same direction. In *Irving v. Callow Park Dairy Co.* (2) Lord Alverstone C.J. said: "Having regard to more recent cases, I doubt whether *Harris v. May* (4) can be regarded as law." In *Robertson v. Harris* (7) Ridley J. adopted the explanation of *Harris v. May* (4) given by Charles J. in *Laidlaw v. Wilson* (3), but afterwards in *Elliot v. Pilcher* (5) Ridley J. stated that he thought his opinion as expressed in *Robertson v. Harris* (7) was erroneous. Thus the current of authority supports *Elliot v. Pilcher* (5) rather than *Harris v. May* (4), and on the authority of *Elliot v. Pilcher* (5) the justices were right in not convicting the respondent. [He also referred to *Jiorns v. Van Tromp*. (8)]

(1) (1802) 2 East, 446.

(2) (1902) 87 L. T. 70.

(3) [1894] 1 Q. B. 74.

(4) 12 Q. B. D. 97.

(5) (1895) 64 L. J. (M.C.) 171; sub nom. *Jorns v. Von Tromp*, 72 L. T. 499.

(5) [1901] 2 K. B. 817.

(6) (1890) 60 L. J. (M.C.) 70; 55 J. P. 407.

(7) [1900] 2 Q. B. 117.

*Hills*, in reply. With the exception of *Elliot v. Pilcher* (1), there is no case in which, in the absence of some evidence in writing connecting the particular article in question with a previously given warranty, the retail vendor has been acquitted.

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DARLING J. In this case, as, I regret to say, the Court is not agreed, it falls to me to deliver judgment first. The respondent, having been summoned for an offence against the Sale of Food and Drugs Act, contended that he had bought the milk in question with a warranty as to its purity, and he relied on s. 25 of the Act of 1875 as a defence to the proceedings against him. The milk was supplied to the respondent in December, 1905, under a contract which he had entered into with one Mott in August, 1905, and after the making of the contract, and before any milk had been supplied under it, Mott gave to the respondent a letter in the following terms: "August 5, 1905. I guarantee that the milk supplied by me to Mr. Stevens is perfectly pure and with all its cream as the cow gives it." At the time that letter was given the milk which is the subject of these proceedings was of course not in existence; and in the case of *Robertson v. Harris* (2) the question was raised by me, though not decided, as to whether a contract which says what is to be the state of things in future can be a written warranty within s. 25 of the Sale of Food and Drugs Act, 1875. Mr. Hogg's argument in this case has successfully disposed of that question, for it appears that, whatever may once have been the case, it cannot now be maintained that a warranty can only apply to things in existence at the time the warranty was given. The doubt which I expressed on this point in *Robertson v. Harris* (2) was based on a passage in Blackstone's Commentaries, 1st ed. vol. iii. p. 165, and owing to the system of pleading then in force Blackstone's statement of the law was correct at the time it was made; but subsequently it was found to be possible to frame declarations in a different manner so as to get rid of the difficulty, and the proposition cannot now be maintained.

We therefore have in the present case a contract which may be a warranty within s. 25 of the Act and which is also capable of being a warranty as defined by s. 62 of the Sale of

(1) [1901] 2 K. B. 817.

(2) [1900] 2 Q. B. 117.



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Goods Act, 1893, the definition in that section being practically a repetition of the definition given by Lord Abinger in *Chanter v. Hopkins* (1), namely, "a warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and though part of the contract, yet collateral to the express object of it." The question which we have to decide in the present case is whether the particular can of milk was bought by the respondent under a contract which contained a warranty collateral to its main object. It is not disputed that the contract, and the collateral stipulation or warranty in the contract, related to milk which was to be supplied in the future. In my opinion, according to the cases which have been decided on this question, some connection must be established between any particular article subsequently supplied and the warranty which is relied on. It may be that the circumstances of this case are such as to give the respondent a right of action against his vendor for breach of warranty, but I have come to the conclusion that there is not sufficient evidence connecting the particular consignment of milk in question with the warranty contained in the letter of August 5, 1905, so as to enable the respondent to bring himself within the protection afforded by s. 25 of the Act.

I do not want to go in detail through all the cases. It is sufficient to say that I think that *Harris v. May* (2), *Farmers and Cleveland Dairy Co. v. Stevenson* (3) (according to the report in the *Justice of the Peace*, which must be, I think, more accurate than the report in the *Law Journal*), *Irving v. Callow Park Dairy Co.* (4), and *Laidlaw v. Wilson* (5) are authorities which support the opinion which I have formed in this case. We have been pressed by counsel for the respondent to adopt his contention that these cases were wrongly decided, and that *Harris v. May* (2) has been overruled by *Elliot v. Pilcher*. (6) If it is necessary to choose between these two decisions, I am unable to adopt the judgments in *Elliot v. Pilcher*. (6) The Court in that case, admittedly, did come to the conclusion that *Harris v. May* (2)

(1) (1838) 4 M. &amp; W. 399, at p. 404.

(2) 12 Q. B. D. 97.

(3) 60 L. J. (M.C.) 70; 55 J. P. 407.

(4) 87 L. T. 70.

(5) [1894] 1 Q. B. 74.

(6) [1901] 2 K. B. 817.

was wrongly decided, but I cannot find in the judgments sufficient reasons to cause me to think that *Elliot v. Pilcher* (1) is right and that *Harris v. May* (2) is wrong. I may also point out that the judgment of Bigham J. in *Elliot v. Pilcher* (1) was, so far as it dealt with *Harris v. May* (2), gratuitous, because he really decided the case on the point that s. 25 did not apply to a complaint under s. 9. That was sufficient to decide the case before him, and it was therefore unnecessary to discuss the decision in *Harris v. May*. (2) *Elliot v. Pilcher* (1) is also, in my opinion, inconsistent with the later case of *Irving v. Callow Park Dairy Co.* (3), which might have been decided the other way if *Elliot v. Pilcher* (1) had been followed. Apart from authority, I think that there is good reason why a person in the position of the respondent should not be permitted to rely on the terms of a general contract, or warranty, made some time before the particular goods are supplied. It is much more likely that he will in that case be careless and supply inferior goods than he would be if he were bound to give a separate warranty with each particular consignment, or, at any rate, a writing expressly connecting the consignment with the warranty previously given.

For these reasons I have come to the conclusion that this appeal must be allowed.

RIDLEY J. I regret to say that I am of the contrary opinion. I think that the facts proved here do satisfy the requirements of s. 25. The section says that there must be a written warranty at the time the article is purchased; it does not in terms deal with the case of a contract of sale under which future deliveries are to be made, nor does the section say that in the case of future deliveries there must be some writing connecting them with the original contract containing the warranty. Since the section itself does not throw any light on these points, I think one must consider what is the law relating to warranties in general; and if one finds that in law a warranty contained in a contract of sale may and does attach to all deliveries of goods under that contract, even though the goods were not in existence

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(1) [1901] 2 K. B. 817.

(2) 12 Q. B. D. 97.

(3) 87 L. T. 70.

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at the time the contract was made, then in my opinion such a warranty will satisfy the requirements of s. 25. In the present case the justices have found as a fact that the warranty was intended to be a continuous warranty, and that the milk in question was delivered under the original contract of sale and under the warranty. In my opinion these findings are sufficient to bring the case within s. 25.

The authorities are, unfortunately, conflicting, but it is quite clear that an ordinary warranty does apply to future deliveries, and, as was pointed out by Lord Coleridge in *Harris v. May* (1), in a case like the present, the purchaser, that is, the respondent, could have sued his vendor for breach of warranty. That being so, why is not the Act satisfied? I can find nothing in s. 25 to say that a purchaser is to do more than put himself in such a position that he has a remedy against his vendor if the article supplied is not in accordance with the warranty. The section is intended as a protection for persons who are charged with certain offences against the Act, and should, therefore, in my opinion, receive a liberal construction.

With regard to the authorities, in *Harris v. May* (1) Lord Coleridge, while thinking that an action for breach of warranty could have been brought on the contract in that case, nevertheless held that it was not sufficient to comply with the requirements of s. 25. It is on that point that I am in conflict with him. I cannot find anything in the Act to say that the person claiming the protection of the section must do more than obtain such a warranty as would enable him to make his vendor liable in the event of a breach. Lord Coleridge goes on to say that "a person seeking to protect himself against the penalty and wishing to make himself perfectly safe in respect of the sale of a specific article must shew that he had a proper specific warranty in writing in respect of that article from his vendor"; in other words, *Harris v. May* (1) decided that a common law warranty applicable to future deliveries is not sufficient, but that there must be a separate and specific warranty relating to each particular consignment of goods. I cannot find that the Act anywhere says that that must be so. At the end of his judgment

Lord Coleridge said: "It is possible that he may have had a parol statement, amounting to a warranty, from his vendor each morning that the milk was supplied, but that would not be sufficient to comply with the requirements of the Act." That shews, I think, that the question of future deliveries may have occurred to Lord Coleridge; but the real decision in *Harris v. May* (1) was, as I have said, that there must be a separate warranty with each article sold, and with that decision, I regret to say, I am unable to agree.

In *Laidlaw v. Wilson* (2) there was a written contract for the sale of what was described as "pure lard," and the question was whether the purchaser could rely on that as a written warranty within s. 25 covering a delivery of lard made a few days after the contract. The Court held that the use of the word "pure" in the contract constituted a warranty of purity, because it was a statement made at the time of the contract. Wright J. in terms said that the contract was a warranty within s. 25, and the same thing may be implied from the judgment of Charles J.; but in dealing with *Harris v. May* (1) the latter judge said, referring to the judgment of Lord Coleridge: "I think that what he really meant was that it was not such a warranty as would cover the specific delivery of milk on April 12 in the absence of some written evidence that that specific delivery was made under the contract. In the present case there is evidence that the particular parcel of lard was delivered under the contract, the delivery having been accompanied by an invoice which describes the lard in the same terms as those contained in the contract." The authority for that distinction between *Laidlaw v. Wilson* (2) and *Harris v. May* (1) is to be found in the last sentence of the judgment in *Harris v. May* (1), but I do not think that that passage does really support the distinction. Lord Coleridge did not say anything about written evidence connecting subsequent deliveries with the original warranty, and the key to his decision was that there must be a specific warranty with each specific consignment. Wright J. in *Laidlaw v. Wilson* (2) said that "The word 'pure' in the contract of December 17 amounts to an agreement as an essential part of the contract that the lard

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(1) 12 Q. B. D. 97.

(2) [1894] 1 Q. B. 74.



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supplied should be pure, and that is, in my opinion, a sufficient warranty of its purity within the meaning of the section." There is nothing there by way of qualification as to the necessity of connecting the particular delivery with the contract by written evidence, and if that passage is accepted as correct, it is decisive of the present case. It is, in my view, in accordance with the true construction of s. 25, though no doubt it is to some extent in conflict with some of the other cases. In *Robertson v. Harris* (1) I adopted the distinction suggested by Charles J. in *Laidlaw v. Wilson* (2), and, thinking that the cases could be reconciled in that way, I followed *Harris v. May*. (3) Darling J. agreed in the decision, but based his judgment on different grounds.

In *Elliot v. Pilcher* (4), which was decided by Bigham J. and myself, I came to the conclusion, after hearing the matter further discussed, that what I had said in *Robertson v. Harris* (1) as to the distinction between *Laidlaw v. Wilson* (2) and *Harris v. May* (3) was not correct. I agreed, and do still agree, with the judgment delivered by Bigham J. in *Elliot v. Pilcher*. (4) I was not called upon to go so far as to say that *Robertson v. Harris* (1) must necessarily be overruled; but I now think that *Robertson v. Harris* (1) cannot stand with *Laidlaw v. Wilson* (2), and if *Harris v. May* (3) is wrong *Robertson v. Harris* (1) must also be considered wrong. In *Elliot v. Pilcher* (4) Bigham J. dealt with the matter at considerable length. I do not propose to repeat what he said, but I entirely accept his reasoning, and I do not understand why, as he says, there should not be held to be a sufficient warranty in a case like the present to satisfy s. 25. Darling J. has suggested to-day that it was not necessary for Bigham J. to deal with this question in *Elliot v. Pilcher*. (4) I agree that the judgment might have been based on the point that the offence there was not one to which s. 25 applied; but the point as to the warranty was fully argued, and we did in fact decide the case on that point, and in my opinion our decision was right. The case of *Farmers and Cleveland Dairy Co. v. Stevenson* (5) was referred to in *Elliot v. Pilcher*. (4) According to the report of that case

(1) [1900] 2 Q. B. 117.

(2) [1894] 1 Q. B. 74.

(3) 12 Q. B. D. 97.

(4) [1901] 2 K. B. 817.

(5) 60 L. J. (M.C.) 70; 55 J. P.

in the *Law Journal* the decision supports the contention for the respondent. The facts there were very similar to those of the present case, though it is true that there was in addition a label attached to each can of milk containing the words "Warranted genuine new milk with all its cream on"; but from the report of the judgments in the *Law Journal* it seems that neither Hawkins J. nor Stephen J. placed any reliance on the fact of the labels, but treated the fact of a written warranty followed by delivery as being sufficient to satisfy the statute. In the report of the case in the *Justice of the Peace* there is in the judgment of Stephen J. a reference to the labels, and to that extent, therefore, it may be said that the case is not conclusive of the question which we have to decide here.

I therefore come to the conclusion that *Laidlaw v. Wilson* (1) is an authority in favour of the opinion which I am now expressing; that *Elliot v. Pilcher* (2) is so also, and *Farmers and Cleveland Dairy Co. v. Stevenson* (3), as reported in the *Law Journal*. On the other side there is *Harris v. May* (4), and possibly *Irving v. Callow Park Dairy Co.* (5), though, as the facts there were different from the present case, I am not prepared to deal with it as a conflicting authority.

For these reasons I have come to the conclusion that this appeal should be dismissed.

LORD ALVERSTONE C.J. I think that this appeal should be allowed, though, having regard to the contrary opinion held by Ridley J., I have considerable doubt about the matter.

My reason for holding that the appeal should be allowed is that, in my view, a long series of cases has established the necessity for a written connection between the warranty and the particular parcel of goods, and the decision which purports to overrule the first case in that series cannot, in my opinion, be regarded as satisfactory.

I am clearly of opinion that s. 25 was not intended to be confined to the case of goods which are actually in existence at

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(1) [1894] 1 Q. B. 74.

(3) 60 L. J. (M.C.) 70; 55 J. P. 407.

(2) [1901] 2 K. B. 817.

(4) 12 Q. B. D. 97.

(5) 87 L. T. 70.

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the time the warranty is given, and that it applies equally to articles subsequently made and supplied; but the fact that by s. 20 of the Act of 1899 a copy of the invoice relied on is to be sent by the defendant to the purchaser points to something which can *prima facie* be identified with the subject-matter of the proceedings. I share with Darling J. the feeling of objection to holding that s. 25 is satisfied by a general contract which may have been in existence for years, and which can only with great difficulty be identified by the purchaser as relating to the particular goods in respect of which complaint is made. The warranty referred to in s. 25 does not, in my opinion, point merely to a general right of action, but to a specific contract applicable to the goods in question.

I will briefly state why I think that the authorities, with the exception of *Elliot v. Pilcher* (1), are not inconsistent with the view that this appeal must be allowed. It cannot be disputed that in *Harris v. May* (2), whatever may be the limitation put upon Lord Coleridge's judgment, he clearly expressed the opinion that a person seeking to protect himself against a penalty must shew that he had received from the vendor a specific warranty in writing in respect of the particular article, and that a parol statement amounting to a warranty from the vendor each morning that the milk was supplied was not sufficient, but I think that decision recognizes that written evidence connecting the particular consignment with a general warranty previously given would satisfy the requirements of s. 25.

With regard to *Farmers and Cleveland Dairy Co. v. Stevenson* (3), it seems to me that, whichever report is looked at, the case does not assist the contention that the Court intended to dissent from *Harris v. May*. (2) According to the report in the *Law Journal*, the judgment of Hawkins J., which is, I think, the one Ridley J. mainly relies on, was directed to the view expressed by the magistrate that the label on the cans was not a warranty, and, as I understand it, Hawkins J. held that, having regard to the previous contract, which contained a warranty, the label on the cans was a sufficient warranty with regard to the particular consignment of milk. Therefore, without referring

(1) [1901] 2 K. B. 817.

(2) 12 Q. B. D. 97.

(3) 60 L. J. (M.C.) 70; 55 J. P. 407.

to the judgment of Stephen J. as reported in the *Justice of the Peace*, where he speaks of each parcel being covered by the contract and the label, I cannot regard that case as in any way qualifying the distinct decision in *Harris v. May*. (1)

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In *Laidlaw v. Wilson* (2) there was a contract relating to pure lard and an invoice identifying the particular parcel as having been delivered under the contract, and Charles J. held that a contract for pure lard was a warranty that the lard should be pure lard within s. 25; and then, in referring to *Harris v. May* (1), he in no way differs from Lord Coleridge in thinking that some writing connecting the parcel with the contract was necessary, for he says: "I think that what he really meant was that it was not such a warranty as would cover the specific delivery of milk on April 2, in the absence of some written evidence that that specific delivery was made under the contract. In the present case there is evidence that the particular parcel of lard was delivered under the contract, the delivery having been accompanied by an invoice which describes the lard in the same terms as those contained in the contract. The invoice, however, is material, not as itself containing a warranty of purity, but as earmarking the particular parcel as having been delivered under a contract in which a written warranty of purity was contained." I think that is a recognition of the correctness of the decision in *Harris v. May* (1), at any rate in the limited way in which Charles J. construed it. It is true that Wright J. did not in his judgment deal with that point, but confined his remarks to the main question which had been argued, namely, whether the use of the word "pure" in the contract amounted to a warranty; but I cannot help thinking that, if Wright J. had intended to lay down the wide proposition that a warranty in a contract is sufficient, for the purposes of s. 25, to protect all future deliveries without having any writing to connect a particular parcel with the contract, that very accurate and careful judge would most certainly have pointed out that what Charles J. had said as to the necessity for such a writing was in his opinion quite immaterial for the decision of the case then before them.

(1) 12 Q. B. D. 97.

(2) [1894] 1 Q. B. 74.



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The next case to which I wish to refer is *Jiorns v. Van Tromp* (1), where *Laidlaw v. Wilson* (2) and *Harris v. May* (3) were both discussed; and Cave J., in giving judgment, said: "No doubt there are some cases in which the invoice ought to be looked at, as in the case of *Farmers and Cleveland Dairy Co. v. Stevenson* (4), where milk was delivered in churns with a label on each churn stating that the milk was warranted genuine new milk. It was there held that the label did not contain a warranty, but merely identified the milk as part of the delivery. Not only so, but, as stated by Charles J. in *Laidlaw v. Wilson* (2), the judgment of Lord Coleridge C.J. in *Harris v. May* (3) is to be supported on the ground that although there was a written warranty, and although the man was convicted, yet he was properly convicted, because there was nothing in the nature of a label to shew that the specific delivery of the milk then in question was made under the contract. Therefore, where there is a written warranty the label may be looked at for the purpose of shewing that the delivery was a delivery under the written contract: but where there is not a written warranty the label by itself does not import one." That passage shews that Cave J. agreed with the view of Charles J. as to the effect of the decision in *Harris v. May*. (3) The last sentence is, I think, subject to qualification, as I shall point out when I come to consider *Irving v. Callow Park Dairy Co.* (5) Wright J. in *Jiorns v. Van Tromp* (1) said: "I am of the same opinion. It was decided by the case of *Laidlaw v. Wilson* (2) that the word 'warranted' is not necessary; but there must be something more than simply passing on an article with a label upon it made by another person, as was the case here. So far as I can express what I mean, a warranty must be some express, individual representation from the seller to the buyer, forming part of the contract, and in writing, given in such a way as not necessarily to have reference to the provisions of this Act, but so as to be an essential term in the contract between the buyer and the seller." Wright J., again, did not refer to what has been said by Cave J. as to *Harris v.*

(1) Sub nom. *Iorns v. Van Tromp*,  
72 L. T. 499, at p. 500.

(2) [1894] 1 Q. B. 74.

(3) 12 Q. B. D. 97.

(4) 60 L. J. (M.C.) 70; 55 J. P. 407.

(5) 87 L. T. 70.

*May* (1), but I cannot think that in both these cases—*Laidlaw v. Wilson* (2) and *Jorns v. Van Tromp* (3)—Wright J. can be regarded as intending to dissent from the view expressed in the one case by Charles J. and in the other by Cave J., and to lay down a much wider proposition. *Robertson v. Harris* (4) is a decision on the very point which we are now considering, and the reasoning in *Harris v. May* (1) was supported. The distinction in *Laidlaw v. Wilson* (2) as to there being written evidence to connect the specific delivery with the contract was also pointed out; and Ridley J. said: "If there had been anything written in this case to shew that the warranty contained in the general agreement for the delivery of the milk extended and related to the article in question, then there would have been enough to satisfy the statute. In the absence of that evidence it appears to me that the magistrate came to the wrong conclusion when he said that the defendant who was charged with the offence under this statute had brought himself under the provisions of s. 25." Ridley J. has since come to the conclusion that his judgment in that case was wrong, but I venture to think that it was right. Then Darling J. agreed with Ridley J.'s judgment and with *Harris v. May* (1) and *Laidlaw v. Wilson* (2), though he also discussed the case from the point of view as to whether a warranty could in any event relate to future deliveries. That point has now been cleared up. I think, and have thought from the beginning of this case—and Darling J., as I understand him, agrees—that although Mr. Hills may have been right historically with regard to the original meaning of the word "warranty," it is quite impossible to confine the application of s. 25 to existing goods.

I have now called attention to five cases, all of which recognize the principle of *Harris v. May* (1), and one of them in terms says that it was right.

I now come to the case of *Elliot v. Pilcher* (5), which was decided by Bigham and Ridley JJ. I think their decision goes too far. The head-note to the report states that the defendant need not prove a specific written warranty with respect to each

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(1) 12 Q. B. D. 97.

(2) [1894] 1 Q. B. 74.

(3) 64 L. J. (M.C.) 171, sub nom.

*Jorns v. Van Tromp*, 72 L. T. 499.

(4) [1900] 2 Q. B. 117.

(5) [1901] 2 K. B. 817.

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delivery, nor "need there be evidence in writing to connect the milk in question with the warranty on which he relies. *Laidlaw v. Wilson* (1) followed. *Harris v. May* (2) and *Robertson v. Harris* (3) not followed." I have already pointed out that *Laidlaw v. Wilson* (1) did not decide that there need not be evidence in writing to connect the milk with the warranty, and, in my opinion, decisions which have stood for well nigh twenty years ought not to be overruled unless very good reasons can be given to shew that they are wrong. With all deference to Bigham J., I cannot find in *Elliot v. Pilcher* (4) any good reasons for overruling *Harris v. May*. (2) Bigham J. said: "I cannot see why that warranty," i.e.—the warranty in *Harris v. May* (2)—"was not a proper specific warranty in writing which satisfied the provisions of the Act. Lord Coleridge may possibly have meant that there must be some writing to connect the article sold with the warranty and attached to the article. But how is that arrangement to be carried out? Is the purchaser to attach it when he receives the milk, or is the original vendor to attach it to each can as it is delivered." Bigham J. cannot have had present to his mind the practice, which has been shewn to exist in many cases, of having a document delivered with each can either referring to or repeating the original warranty. Bigham J., referring to *Robertson v. Harris* (3), said: "The explanation adopted by the Court seems to have been that, in order to make a warranty good with respect to particular goods under s. 25, there must be some writing to earmark the goods and connect them with the warranty—some document describing them so that anyone reading it might connect the warranty with the article sold. I can find nothing in the Act to make the person who sells by retail subject to so onerous a condition." It seems to me to be a most reasonable and proper thing, unless the Act prevents it, to permit a document to be referred to for the purpose of establishing the defence of a warranty under s. 25. I have come to the conclusion that the reasons given in the judgment of Bigham J. are not sufficient to enable us to dissent from, or not to follow, a long series of cases in which this practice has been

(1) [1894] 1 Q. B. 74.

(2) 12 Q. B. D. 97.

(3) [1900] 2 Q. B. 117.

(4) [1901] 2 K. B. 817.

recognized, and in coming to this conclusion I am fortified by the fact that Ridley J. had taken a different view in the previous case.

I wish to add that I did not intend in *Irving v. Callow Park Dairy Co.* (1) to express the opinion that *Harris v. May* (2) was wrong from this point of view. In that case Darling and Channell JJ. and myself held that the label there was a sufficient warranty, and also that a verbal contract would do for the purpose of constituting a liability between the retailer and the original vendor; but we said that a warranty which was connected with each delivery was sufficient to satisfy the statute. In expressing that view I never intended to put any qualification on the true view of *Harris v. May*. (2) What I am reported to have said was: "Having regard to more recent cases I doubt whether *Harris v. May* (2) can be regarded as law. If it was meant to lay down any general principle it has certainly been qualified by later cases. I have come to the conclusion that in both cases here the purchaser had purchased the milk in question as the same in nature, substance, and quality as that demanded of him by the prosecution, and had in each case had a written warranty to the same effect." When it is remembered that that was said in reference to a memorandum or label which was on each churn, I do not think that it can be used in support of the view that there need be no writing connecting the warranty with a particular consignment of goods.

I think that there was no evidence in the present case on which the justices could find that the requirements of s. 25 had been complied with, and the appeal must therefore be allowed and the case remitted to the justices for them to convict.

*Appeal allowed.*

Solicitor for appellant: *Sir Richard Nicholson.*

Solicitor for respondent: *Gee, for Bucknall, Rickmansworth.*

(1) 87 L. T. 70.

(2) 12 Q. B. D. 97.

F. O. R.

*Note on the pagination of Blackstone's Commentaries* (p. 325, ante). The publishers of ed. 12 (by Christian), 1793, purported to preserve "the pages of the former editions" in the margin: what they did preserve was the paging of ed. 10, 1787;

this nearly, but not quite, follows that of ed. 9 (by Burn), 1783, which is in the British Museum, but in none of the Inns of Court libraries. Earlier editions do not seem to vary from ed. pr.—F. P.

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May 30.

GREAVES *v.* WHITMARSH, WATSON & CO., LIMITED.

*Landlord and Tenant—Lease—Covenant by Lessee to pay "Outgoings"—  
Paving Expenses—Liability of Lessee.*

Under a covenant in a lease to pay "all rates, taxes and outgoings now payable or hereafter to become payable in respect of the premises," the lessee is liable for the cost of paving works incurred under s. 150 of the Public Health Act, 1875.

APPEAL from the Sheffield County Court.

The action was brought to recover the sum of 22*l.* 13*s.* 3*d.* paid by the plaintiff to the Sheffield Corporation as the proportion of expenses incurred under s. 150 of the Public Health Act, 1875, in levelling, paving, and making good the road abutting on certain premises of which the plaintiff was lessor and the defendants were lessees, for the repayment of which the plaintiff contended that the defendants were liable under a covenant contained in the lease of the premises.

By a lease dated October 16, 1894, the plaintiff demised the premises to the defendants for twenty-one years at an annual rent of 105*l.* 16*s.*, clear of all deductions (except property tax), and the defendants covenanted (*inter alia*) that the lessees would pay the rent reserved and "all rates, taxes, and outgoings now payable or hereafter to become payable in respect of the said premises." The lease also contained a repairing covenant.

The county court judge held, upon the authority of *Hill v. Edward* (1) and *Tidswell v. Whitworth* (2), that the plaintiff could not recover, and gave judgment for the defendants.

The plaintiff appealed.

*Foà*, for the plaintiff. The two cases upon which the county court judge based his decision are no longer law. In *Tidswell v. Whitworth* (2), where the tenant covenanted to "pay and discharge all taxes, rates, assessments, and impositions whatsoever (except property or income tax in respect of the said rent) which . . . should become payable in respect of the demised

(1) (1885) *Cab. & E.* 481.

(2) (1867) *L. R.* 2 *C. P.* 326.

premises," it was held that the tenant was not liable for the expense of sewerage and paving works paid by the landlord, inasmuch as the payment was in respect of the breach of a duty cast upon the landlord as owner by a local Act. In *Thompson v. Lapworth* (1) the covenant was to pay "all taxes, rates, duties, and assessments whatsoever which during the continuance of the demise should be taxed, assessed or imposed on the tenant or landlord of the premises demised in respect thereof"; and it was held that the expense of paving works was a "duty" or "assessment" within the meaning of the covenant, *Tidswell v. Whitworth* (2) being distinguished substantially on the ground that the covenant in that case did not contain the word "duties." In five subsequent cases—namely, *Brett v. Rogers* (3), *Antil v. Godwin* (4), *Farlow v. Stevenson* (5), *In re Warriner* (6), and *Stockdale v. Ascherberg* (7)—a covenant containing one or other of the words "impositions," "outgoings," or "duties" has been held to throw the liability on to the tenant; and only in *Hill v. Edward* (8) has the tenant been held not to be liable. The last named case, which was decided at nisi prius, was doubted by Grove J. in *Aldridge v. Ferne* (9), and should not be followed. In *Foulger v. Arding* (10), where the Court had to construe a covenant by which the tenant undertook to pay "impositions . . . charged or imposed upon or in respect of the premises on the landlord tenant or occupier of the same," it was held that the cost of abating a nuisance fell upon the tenant, and in the course of his judgment Collins M.R. pointed out that in the more recent cases greater emphasis is laid on the presence of words like "duties" or "outgoings" in the description of the obligations included in the covenant than on words describing the person or persons on whom they were imposed. Neither in *Brett v. Rogers* (3) nor in *Farlow v. Stevenson* (5) were such words as "or imposed on the tenant or landlord" included in the covenant, and in the former Bruce J. said that no importance could be

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(1) (1868) L. R. 3 C. P. 149.

(2) L. R. 2 C. P. 326.

(3) [1897] 1 Q. B. 525.

(4) (1899) 15 T. L. R. 462.

(5) [1900] 1 Ch. 128.

(6) [1903] 2 Ch. 367.

(7) [1904] 1 K. B. 447.

(8) Cab. &amp; E. 481.

(9) (1886) 17 Q. B. D. 212.

(10) [1902] 1 K. B. 700.

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attached to their omission. The fact, therefore, that in the covenant in this case such words do not occur does not alter the incidence of this obligation. The further circumstance relied on by the present defendants that in most of these cases the work the cost of which was sought to be imposed upon the tenant was sanitary work done on the demised premises, and not paving work, can make no difference in the construction of the covenant. The cost of making up a street is imposed in respect of the premises, and is an expense quite as much in the contemplation of the parties to a lease as sanitary work on the premises.

*T. E. Ellison*, for the defendants. Two questions must be considered: first, the nature of the particular expenditure the burden of which is sought to be cast upon the tenant; and, secondly, the language of the particular covenant. As to the first, the liability under s. 150 of the Public Health Act, 1875, is essentially one cast upon the owner. It has no reference to occupation, but refers to ownership; on the other hand, sanitary work on the premises has reference solely to occupation. This distinction is an important factor in considering what was within the contemplation of the parties, which is the question to be regarded in construing such a covenant: see per Collins M.R. in *Foulger v. Arding* (1); and it is difficult to see how something which has no reference to occupation can have been in the contemplation of the tenant. No case has been decided in relation to paving expenses in which, in the absence of such words in the covenant as "or imposed upon the lessor," the liability has been cast upon the tenant. In the present case the covenant ought to be construed as covering only such outgoings as are ejusdem generis with rates and taxes. *Hill v. Edward* (2) is a direct authority in favour of the defendants, and *Tidswell v. Whitworth* (3) is in point, and has not been overruled.

LORD ALVERSTONE C.J. A strenuous attempt has been made by the defendants' counsel to distinguish this case from a series of decisions in the Court of Appeal. If the question in the present case had arisen before those cases were decided, there

(1) [1902] 1 K. B. 700.

(2) Cab. & E. 481.

(3) L. R. 2 C. P. 326.

would have been much to be said for his contention that a covenant like the one under consideration does not impose on the lessee a burden which was originally imposed upon the owner, and which the tenant has not by contract specifically agreed to take upon himself.

When the case of *Foulger v. Arding* was before us in the Divisional Court (1) I thought I could see a clear line of distinction between cases relating to money payments and cases in which duties were referred to so as to shift the burden from the landlord to the tenant; but I had to distinguish the case then before us in which the word was "impositions" from a case in which Wright J. thought that "outgoings" would throw upon the tenant a liability of this character. When *Foulger v. Arding* (2) went to the Court of Appeal, Collins M.R. held that one must not merely refer to the words of the particular covenant to shew that one covenant is more on one side than another, if there are words which indicate a general intention to impose burdens in respect of the property upon the tenant and not upon the landlord. In the present case the question is whether this covenant comes within the principle so laid down. In favour of the plaintiff's view there is distinct authority in *Antil v. Godwin* (3), where Bruce J. held that the word "outgoings" was sufficient to impose upon the tenant the obligation to pay a charge in respect of the reconstruction of drainage; it is perfectly true, indeed, that some distinction might have been drawn as to the character of the work done, but that was not the ground upon which the decision was based. When *Foulger v. Arding* (2) is considered, it will be seen that Collins M.R. and Romer L.J. declined to follow the distinction which I had tried to draw. In *Stockdale v. Ascherberg* (4)—also relating to sanitary works—the Court of Appeal held, affirming the decision of Wright J., that a covenant to pay all "outgoings in respect of the premises" imposed the liability upon the tenant simply on the word "outgoings." If effect is to be given to the distinction now sought to be drawn between a payment in respect of the road in front of a house and one in respect of a drain which leads up to the house, it

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(1) [1901] 2 K. B. 151.

(3) 15 T. L. R. 462.

(2) [1902] 1 K. B. 700.

(4) [1904] 1 K. B. 447.



1906 <hr style="width: 100px; margin: 0;"/> GREAVES <i>v.</i> WHITMARSH, WATSON & Co., LIMITED. <hr style="width: 100px; margin: 0;"/> Lord Alverstone C.J.	must be done by a higher tribunal. In this Court we cannot, in the face of the decisions in <i>Foulger v. Arding</i> (1) and <i>Stockdale v. Ascherberg</i> (2), hold that there is any distinction to be made in favour of the tenant because this was an expense incurred under s. 150 of the Public Health Act, 1875. It is an "outgoing" in respect of the premises. The appeal, therefore, must be allowed.
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DARLING J. I am of the same opinion. I think it is evident, especially from the observations of Romer L.J. in *Foulger v. Arding* (1), that the suggested distinction, that one is not only to look to the words of the covenant but also to see whether the work in respect of which the payment is made is more for the benefit of the landlord or tenant, cannot now be taken. At one time it was quite possible that some such principle might be adopted, but that is not the case now. Romer L.J. regarded it as impossible to reconcile all these cases, and he declined to follow the distinction suggested on behalf of the defendants.

*Appeal allowed ; leave to appeal refused.*

Solicitor for plaintiff : *T. H. Aldous, for J. E. Wing, Sheffield.*

Solicitors for defendants : *Bell, Brodrick & Gray, for Rodgers & Co., Sheffield.*

(1) [1902] 1 K. B. 700.

(2) [1904] 1 K. B. 447.

W. J. B.

## DIESTAL v. STEVENSON.

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*June 14, 15.**Contract, Breach of—Measure of Damages—Penalty or Liquidated Damages.*

The defendants, coal exporters at Newcastle, entered into a contract with the plaintiff for the sale and delivery to him in Germany of a quantity of coal, of which part was to be screened and part small coal, at certain prices per ton c.i.f. The contract, which was drawn up by the defendants, contained the following clause: "Penalty for non-execution of this contract by either party one shilling per ton on the portion unexecuted, and the amount of proved loss, if any, on freight actually arranged by us." In an action to recover damages for non-delivery of the coal, the plaintiff claimed that the 1s. per ton mentioned in the contract was a penalty and might be disregarded, and that he was entitled to recover the difference between the contract price and the market price in Germany, which difference was much in excess of 1s. per ton:—

*Held* that, notwithstanding that the parties had called the 1s. per ton a penalty, and that the loss caused to the plaintiff by the non-delivery might be different in the case of the screened coal and of the small coal, and that the difference between the contract and market prices was easily ascertainable, the 1s. per ton was to be treated as liquidated damages.

TRIAL before Kennedy J. without a jury.

By a contract in writing dated September 16, 1905, and made between the defendants, coal exporters at Newcastle-on-Tyne, and the plaintiff, a coal importer carrying on business at Lubeck in Germany, the defendants agreed to sell to the plaintiff, to be delivered at Lubeck, "about 10,000 tons of Bothal coals, 10 per cent., more or less, at sellers' option, shipment by steamer due to load or sail as follows:—

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January—About 2000 tons of Bothal screened steam coals at 13/10 per ton c.i.f.

March	900	"	"	"	13/10	"
"	1100	"	small	"	8/4	"
June	1400	"	screened	"	14/5	"
"	600	"	small	"	8/9	"
September	1500	"	screened	"	14/5	"
"	500	"	small	"	8/9	"
November	2000	"	screened	"	13/11	" "

The contract, which was drawn up by the defendants, provided that the sale should be subject to the following, among

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other, conditions: "7th. Penalty for non-execution of this contract by either party one shilling per ton on the portion unexecuted, and the amount of proved loss, if any, on freight actually arranged by us." The defendants, in breach of the contract, neglected to ship the March instalment. The plaintiff claimed as damages the difference between the contract price and market price c.i.f. Lubeck, which amounted to 320*l.* The defendants paid into Court the sum of 90*l.*, being 1*s.* per ton on the quantity of the March instalment, less 10 per cent., and said that that was sufficient to satisfy the plaintiff's claim.

*J. A. Hamilton, K.C.*, and *Adair Roche*, for the plaintiff. The sum of 1*s.* per ton, which by the terms of the contract is made payable on default, is a penalty, and not liquidated damages, and the plaintiff is consequently not precluded from recovering by way of damages more than the sum so named, but may recover the amount of the loss which he has actually sustained. Here the parties have expressly called the 1*s.* per ton a penalty, and the effect of using the word "penalty" is *prima facie* to exclude the notion of stipulated damages: per *Coltman J.*, *Sainter v. Ferguson*. (1) No doubt that is not conclusive, but in the absence of other controlling words or circumstances the parties must be treated as having meant what they have said. Secondly, it is generally regarded as an accepted principle that when one and the same sum is made payable on the non-performance of any one of several stipulations of different degrees of importance, that sum is *prima facie* to be regarded as a penalty: per *A. L. Smith L.J.*, *Willson v. Love*. (2) In *Lord Elphinstone v. Monkland Iron and Coal Co.* (3) *Lord Watson* said: "When a single slump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification." Here the same sum of 1*s.* per ton was payable whether the non-execution of the contract was in respect of screened coal or of small, though the actual damage to

(1) (1849) 7 C. B. 716, at p. 728.

(2) [1896] 1 Q. B. 626, at p. 631.

(3) (1886) 11 App. Cas. 332, at

p. 342.

the purchaser might be very different according as the shortage was of the one class of coal or of the other. The case is on all fours with that of *Willson v. Love*. (1) There a lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises, but to consume them there, and provided that an additional rent of 3*l.* per ton should be payable by way of penalty for every ton of hay or straw so sold, and it appeared that there was a substantial difference between the manurial value of hay and that of straw. It was held that the sum so made payable was a penalty, and not liquidated damages. A third test for determining whether a sum is a penalty or liquidated damages is to consider whether the actual damage resulting from the breach is easily ascertainable or not. If owing to the peculiar circumstances of the case it would be impossible or very difficult to ascertain it, the inference is that the sum was intended to be payable by way of liquidated damages; otherwise, if it would be easily ascertainable. Here there could be no possible difficulty in proving the difference between the contract and market prices.

*Pickford, K.C.*, and *D. M. Hogg*, for the defendants. The sum made payable on non-execution of this contract was liquidated damages, and not a penalty. The contract provides that the "penalty" is to be 1*s.* per ton on the portion unexecuted, "and the amount of proved loss, if any, on freight." The fact that the expression is to include something which is clearly not a penalty shews that the parties did not intend to use it in its technical sense. Therefore the fact that they called the sum a penalty is immaterial: see per Lord Halsbury, *Clydebank Engineering, &c., Co. v. Yzquierdo y Castaneda*. (2) The Court must in every case determine what the parties really meant having regard to all the circumstances: *Pye v. British Automobile Commercial Syndicate*. (3) This is not like the case of a large sum made payable on the non-payment of a smaller one. Nor in this case is the sum payable on breach of stipulations of varying degrees of importance. What the contract professes to do is to agree beforehand the difference between the market value and the contract price at 1*s.* per ton in every case irrespective of

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(1) [1896] 1 Q. B. 626.

(2) [1905] A. C. 6, at p. 9.

(3) [1906] 1 K. B. 425.



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the class of coal, in order to avoid the expense of having to call evidence to prove the difference. The case of *Lord Elphinstone v. Monkland Iron and Coal Co.* (1) resembles the present. There lessees, who had been granted the privilege of placing slag from blast furnaces on land let to them, covenanted to pay the lessor 100l. per acre for all land not restored by a particular date; and it was held that that sum was not a penalty, but stipulated damages, although the land not restored might in one part of the property be more valuable than in another, and the actual loss to the lessor might consequently be different. The case of *Willson v. Love* (2), on which the plaintiff relies, is distinguishable, for there it was found as a fact that there was a difference in the manurial value of hay and straw. Here there is no evidence that the difference between the contract and market prices was in fact different in the two classes of coal. The contention goes no further than that they might be different, and that is not enough.

*Hamilton, K.C.*, in reply. In *Willson v. Love* (2) A. L. Smith L.J. said: "I think that where a sum is spoken of by the parties themselves as a penalty, a strong case is required to shew that it is nevertheless liquidated damages." Here no sufficient case has been made out to justify the Court in saying that the parties meant something different from what they said. *Lord Elphinstone's Case* (1) is distinguishable, for there it would have been very difficult to assess the actual damages. The suggested distinction between *Willson v. Love* (2) and the present case, that in the former the difference in value between the hay and the straw was found as a fact, is untenable, for Lord Esher did not go upon any such ground. He was of opinion that it was sufficient that they might be different. He adopted with approval Lord Watson's proposition, that a single sum payable on the occurrence of one or more of several events "some of which may occasion serious and others but trifling damage" is to be treated as a penalty, with the slight modification that he substituted the words "some of which may occasion serious and others less serious damage." They both used the word "may," not "must." If the contention of the other side is right, then

(1) 11 App. Cas. 332.

(2) [1896] 1 Q. B. 626.

if the defendants had shipped the right quantity of coal, but of a kind not answering the description of Bothal coals, though of as good a quality, and the plaintiff had accepted them and sued for the breach of contract, he could have recovered 1s. per ton as liquidated damages, though he had not suffered a penny of loss. That is an extravagant conclusion.

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KENNEDY J. This is an action in which the plaintiff claims to recover damages for breach of a contract by the defendant for the sale and delivery to the plaintiff of 10,000 tons of Bothal coals, partly screened and partly small, to be shipped in instalments in certain specified months in the present year. The breach complained of consists in the non-delivery of the March instalment, and the question in dispute is as to the amount of the damages that the plaintiff is entitled to recover. The defendants contend that what they are bound to pay for the non-delivery has been settled by agreement by a clause in the contract, which provides as follows: "Penalty for non-execution of this contract by either party one shilling per ton on the portion unexecuted, and the amount of proved loss, if any, on freight actually arranged by us." They say that notwithstanding the use of the term "penalty" it is in reality a clause assessing the damages as liquidated damages in the events which have happened. The plaintiff, on the other hand, contends that the clause is a penalty clause, and that he consequently can recover the actual damage that he has suffered. If the plaintiff is right in his contention, it is agreed that he is entitled to recover 320*l.*; whereas if the defendants are right, he can recover no more than 90*l.*

The question is one of some difficulty, owing to the fact that there have been a number of decisions upon this subject of penalty or liquidated damages which it is not altogether easy to reconcile. There are, however, certain guiding principles which have been laid down by high authority. In *Clydebank Engineering, &c., Co. v. Yzquierdo y Castaneda* (1) Lord Halsbury said: "It cannot, I think, be denied . . . that not much reliance can be placed upon the mere use of certain words. Both in

(1) [1905] A. C. 6, at p. 9.

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England and in Scotland it has been pointed out that the Court must proceed according to what is the real nature of the transaction, and that the mere use of the word 'penalty' on the one side, or 'damages' on the other, would not be conclusive as to the rights of the parties." Secondly, in *Lord Elphinstone v. Monkland Iron and Coal Co.* (1) Lord Watson said: "When a single slump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage, the presumption is that the parties intended the sum to be penal, and subject to modification." There is, I think, a third rule to the effect that prima facie the parties must be taken to mean what they say, and if they use the term "penalty" that is prima facie to be treated as that which is meant. Still, that is a presumption only, and the Court must look at all the circumstances in order to ascertain the real nature of the transaction.

In this case I have come to the conclusion that what the parties really meant was not to leave the matter at large, but in order to avoid the difficulty, as between shipper at Newcastle and buyer at Lubeck, of proving the value of the goods in a market which is constantly fluctuating, to assess the damages beforehand. I think that in using the word "penalty" here the parties did not mean what they said. I think Mr. Pickford was right in laying stress on the fact that they include in that expression "the amount of proved loss, if any, on freight," shewing thereby that they were not using the term in its strict sense. The consideration which arises in some cases, that of there being various breaches of different degrees of importance, on each of which the stipulated sum becomes payable, does not arise here. In this case there is only one kind of breach on which it becomes payable, namely, the non-delivery of the coal by the seller or the non-acceptance by the buyer. But it is said that there were two classes of coal of different prices, and that the loss by the non-delivery of one of those classes of coal might be greater than by the non-delivery of the other. It is true that they might be different. But that is not enough. This is a

very different case from such a one as that in *Willson v. Love* (1), where it was found as a fact that the manurial value of hay was always different from that of straw, and that consequently it was necessarily known to the parties beforehand that the same sum could not possibly represent the lessor's actual loss in respect of both classes of breach. Here there is nothing to shew a priori that the loss in respect of both classes of coals might not be the same, and, therefore, nothing to render it improbable that the parties should have fixed the same sum of 1s. per ton as representing the damage in both classes. Moreover, there is a further distinction between *Willson v. Love* (1) and the present case. There the document was a legal one, a lease drawn up by lawyers in due legal form, and there was consequently a presumption that the persons who drew it, when using the term "penalty," intended to use it in its strict legal sense. Whereas here the agreement was drawn up, not by lawyers, but by business men, and consequently ought not to be so strictly interpreted. I think that there is nothing in the decision of *Willson v. Love* (1) to prevent my deciding in favour of the defendants.

*Judgment for the defendants.*

Solicitors for plaintiff: *Williamson & Hill, for Ingledew & Fenwick, Newcastle-on-Tyne.*

Solicitors for defendants: *Maples, Teesdale & Co., for Bramwell & Bell, Newcastle-on-Tyne.*

(1) [1896] 1 Q. B. 626

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## McNICOL AND ANOTHER v. PINCH.

*Revenue—Excise Licence—Manufacture of Saccharin—Prescribed Book—Finance Act, 1901 (1 Edw. 7, c. 7), s. 9—Revenue Act, 1903 (3 Edw. 7, c. 46), s. 2—Regulations (No. 633 of Statutory Rules and Orders, 1904).*

The “manufacture of saccharin” in the Finance Act, 1901, and the Revenue Act, 1903, means the “bringing into being as saccharin.”

The appellants subjected certain “330 saccharin” (i.e., saccharin 330 times as sweet as sugar) to a chemical process, the result of which was that in some cases “550 saccharin” (i.e., saccharin 550 times as sweet as sugar) was produced, in others a mixture sweeter than 330, but not so sweet as 550 saccharin, and in a few cases a mixture less sweet than 330 saccharin :—

*Held* (per Bray and Darling JJ., Ridley J. dissenting), that the appellants were not manufacturing saccharin within the meaning of the Finance Act, 1901, so as to be compelled to take out the excise licence required by s. 9 of that Act and s. 2 of the Revenue Act, 1903, and to obtain from an officer of Inland Revenue a book such as is prescribed by the Regulation No. 633 of the Statutory Rules, 1904, inasmuch as the substance the appellants dealt with was always saccharin both before and after their treatment of it.

CASE stated by a stipendiary magistrate for Manchester.

An information was preferred on July 22, 1905, by the respondent Luke Pinch, an officer of Inland Revenue, under s. 9 of the Finance Act, 1901, and s. 2 of the Revenue Act, 1903, against the appellants Joseph and John McNicol, for that they the appellants between May 20 and June 4, 1905, in the city of Manchester, did manufacture saccharin without having in force an excise licence for the purpose, contrary to the form of the said statutes and to the regulations made under them by the Commissioners of Inland Revenue. A second information was preferred by the respondent under the said statutes against the appellants for that the appellants before and at the time therein-after mentioned were makers of saccharin at 3, Hanson's Court, in the city of Manchester, and that they, being such manufacturers as aforesaid, on June 3, 1905, in the city aforesaid, failed to obtain from an officer of Inland Revenue a book such as is prescribed by the Regulation No. 633 of the Statutory Rules of the year 1904, contrary to the form of the said statutes

and to the regulations made under them by the Commissioners of Inland Revenue.

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The magistrate convicted the appellants.

Upon the hearing of the informations the following facts were admitted or proved :—

(a) That saccharin is a sweet substance produced from toluene sulphonamide.

(b) That the appellants had not manufactured saccharin from toluene sulphonamide.

(c) That in the production of saccharin certain compounds are produced called "para" compounds. If these are not eliminated in the early stages of the production, para saccharin, which has no sweetness, is produced as well as "ortho" or true saccharin. Where no elimination of para compounds takes place in the early stages of production the product is a mixture of approximately 60 per cent. of ortho saccharin with 40 per cent. para saccharin. This mixture is known commercially as "330 saccharin," and is estimated to be 330 times as sweet as sugar. If the para compounds are practically eliminated in the early stages of production, the product is a mixture of 95 per cent. (or more) of ortho saccharin with a very small percentage of para saccharin. Such a mixture is known commercially as "550 saccharin," and is estimated to be 550 times as sweet as sugar. If 330 saccharin is produced the para saccharin can afterwards be eliminated by a subsequent chemical process and 550 saccharin obtained.

(d) The appellants subjected certain 330 saccharin to a chemical process. The amount of 330 saccharin treated was 5 lbs. purchased in Manchester, and 2 cwt. imported, upon all of which duty had been paid. This amount of 330 saccharin was not treated in one bulk, but in separate quantities. The result of this treatment was that in some cases 550 saccharin was produced, and in some cases a mixture sweeter than 330 saccharin, but not so sweet as 550 saccharin. In a few cases the result was a mixture less sweet than 330 saccharin. Some of the saccharin which had undergone this treatment was sold by the appellants in the course of their business as dealers in saccharin.

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(e) That the appellants at the time they so treated the 330 saccharin had not in force an excise licence for the manufacture of saccharin as required by the regulations of the Commissioners of Inland Revenue made under s. 9 of the Finance Act, 1901 (1), and s. 2 of the Revenue Act, 1903. (2)

(1) Finance Act, 1901, s. 5, sub-s. 1:  
“There shall, as from the eleventh day of June nineteen hundred and one as regards the duty on glucose, and as regards the other duties under this section as from the first day of July nineteen hundred and one, be charged, levied, and paid the following duties of excise—

£ s. d.

On glucose made in Great Britain or Ireland,—

Solid .. the cwt. 0 2 9

Liquid .. „ 0 2 0

and so in proportion for any less quantity.

On saccharin (including substances of a like nature or use) made in Great Britain or Ireland the oz.

0 1 3

and so in proportion for any less quantity.

On a licence to be taken out annually by a manufacturer of any such glucose, or saccharin, or of invert sugar .. .. 1 0 0

and there shall be allowed in respect of glucose and saccharin the drawbacks set out in the Third Schedule to this Act.

Sub-s. 2: “The duty on glucose may be charged either on the quantity actually manufactured or by reference to the quantity ascertained by the Commissioners of Inland Revenue to be capable of being produced from the saccharin solution collected in a receiver to be provided by the maker and fixed and secured to the satisfaction of the Commissioners.”

Sect. 9: “The Commissioners of

Inland Revenue may make regulations prohibiting the manufacture of glucose, saccharin, or invert sugar, except by persons holding a licence and having made entry for the purpose, and for fixing the date of expiration of the licence, and also for regulating the manufacture of glucose with a view to securing and collecting the excise duty imposed by this Act, and may by those regulations apply any enactments relating to the excise duty or drawback on beer, and to brewers of beer, to the excise duty and drawback on glucose, and to manufacturers of glucose, and if any person acts in contravention of, or fails to comply with, any of those regulations, the article in respect of which the offence is committed shall be forfeited, and the person committing the offence shall be liable in respect of each offence to an excise penalty of fifty pounds.”

(2) Revenue Act, 1903, s. 2: “Section nine of the Finance Act, 1901 (which relates to regulations as to excise duty on glucose, &c.), shall (so far as it does not already so apply) apply to saccharin, including substances of a like nature or use, as it applies to glucose, and the Commissioners of Inland Revenue may make regulations under that section as to the manufacture, storage and warehousing without payment of duty of saccharin, and for requiring that the premises in which saccharin is manufactured, warehoused or stored are approved by them and properly secured.”

(f) That the appellants had failed to obtain from an officer of Inland Revenue a book such as is prescribed by Regulation No. 633 of the Statutory Rules and Orders, 1904 (1), made by the Commissioners of Inland Revenue under the statutes above mentioned.

The respondent contended that the provisions of the Finance Act, 1901, and the Revenue Act, 1903, as to saccharin and the regulations made under these Acts as to license and entry of premises were primarily provisions to enable the Revenue authorities to ascertain who was manufacturing saccharin and to confer on them the right to inspect the premises where the manufacture was carried on with a view to preventing frauds

(1) Statutory Rules and Orders, 1904, No. 633 :—

“PART I.

“*As to Licence.*

“1. A person may not manufacture saccharin, including substances of like nature or use, without having in force an excise licence for the purpose and making entry of every building, place, vessel, and utensil used in the manufacture of saccharin or in the storage of materials for its manufacture, and of every room or place upon or adjoining the manufactory, used for the storing or warehousing of saccharin.

“PART II.

“*As to the Manufacture, Storage, and Warehousing of Saccharin.*

“7. Every maker of saccharin must obtain from an officer of Inland Revenue a book in the form prescribed by the Commissioners of Inland Revenue and must observe the following provisions in relation to the book :

“(a) He must keep the book in some part of the entered premises at all times ready for the inspection of

the officers of Inland Revenue, and must permit any officer at any time to inspect the same and make extracts therefrom.

“(b) He must, twelve hours at least before commencing to sulphonate, enter in the book the day and hour when he intends to sulphonate, and must, one hour at least before commencing the operation, enter in the book the quantity of toluene to be used.

“(c) He must enter in the book from time to time, as such operation is completed, (1.) the pounds weight of crystallized toluene sulphonamide produced, (2.) the pounds weight of toluene sulphonamide to be removed for oxidation, (3.) the quantity of unoxidized sulphonamide, if any, recovered from each oxidation, and (4.) the quantity to the nearest ounce of saccharin produced from each quantity of sulphonamide removed for oxidation.

“(d) He must, at the time of making any entry, insert the date when the entry is made.

“(e) He must not cancel, obliterate, or alter any entry in the book, or make therein any entry which is untrue in any particular ”

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upon the Revenue, and that the licence to manufacture saccharin was not only required for a process of deriving saccharin from toluene sulphonamide by adding certain chemical substances to toluene or to sulphonamide but that it was also required for the chemical process mentioned above.

The appellants contended :—

(a) That upon the facts admitted or proved there was no evidence that they had manufactured saccharin within the meaning of the said statutes and the said regulations made thereunder.

(b) That the process of converting 330 saccharin into 550 saccharin was not a manufacture of saccharin within the meaning of the statutes and the regulations.

(c) That the true construction of the term “manufacture” in the statutes and the regulations thereunder implied the assembling together of the constituent elements necessary to make saccharin and the employment of some process to combine them, and that as it was proved that the appellants had not brought the constituent elements of saccharin together, but had merely operated upon saccharin already in existence, their process of converting 330 saccharin into 550 saccharin was not a “manufacturing” of saccharin.

The magistrate was of opinion that the appellants, by treating 330 saccharin by the process above described, had manufactured saccharin within the meaning of the said statutes and the regulations made thereunder, and he thereupon convicted the appellants of the offences charged in the said informations.

The question for the opinion of the Court was whether upon the above statement of facts the magistrate came to a correct determination in point of law.

*Lazarus Langdon, K.C.*, and *W. Ambrose Jones*, for the appellants. The appellants did not manufacture saccharin. What they did was to subject saccharin to certain processes. The amount of duty payable on the saccharin was unaltered. The treatment to which the saccharin was subjected is equivalent to refining whisky or sugar. After the process the saccharin still remained saccharin commercially. A person cannot be said to

“manufacture” unless he starts with one substance and arrives at another. If he arrives at the end of his process with exactly the same thing as he started with he has not manufactured anything. The appellants merely treated saccharin; they cannot be described as manufacturers of it. The Explosives Act, 1875 (38 & 39 Vict. c. 17), contains a definition section, viz., s. 105. For the purposes of that Act the term “manufacturing” has an artificial meaning. But in the Act of 1901 there is no artificial meaning given to the word, and it is therefore used in its commercial sense. The statute was passed for the purpose of imposing a tax on traders. Commercially 330 saccharin and 550 saccharin are both saccharin. The statutes of 1901 and 1903 have to be construed by commercial men, and therefore the word “manufacture” must be understood in a commercial sense, i.e., where there is a transformation of one article into another commercially different.

*Sir J. Lawson Walton, A.-G.* and *W. Finlay*, for the respondent. The object of the statute was that persons carrying on a manufacturing process of this kind should be licensed so that the Crown should have certain rights of inspection. Substances not saccharin would, in order to be converted into saccharin, have to go through all the processes to which the 330 saccharin is submitted by the appellants. The real question is whether this manufacturing process can be carried on without being subject to inspection. It is not a question relating to the Revenue. It is important that this manufacturing process should be subject to clause 7 of the Regulation No. 633 of the Statutory Rules and Orders, 1904. There is no distinction between the meaning of saccharin “manufactured” and “made” in the Acts of 1901 and 1903. Saccharin is so easily disguised that it is impossible to frame regulations that will prevent the Revenue from being defrauded. A drawback may be allowed on saccharin under s. 9 of the Act of 1901, as extended by s. 2 of the Act of 1903.

It is true that there there is no name distinguishing 330 saccharin from 550 saccharin, but this is a mere question of terminology. The argument on behalf of the appellants only amounts to a contention that some name ought to have been

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1906 given to 550 saccharin to distinguish it from 330 saccharin.  
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 PINCH. [The Excise Licences Act, 1825 (6 Geo. 4, c. 81), and *Attorney-General v. Green* (1) were also referred to.]

BRAY J. As there is a difference of opinion it becomes my duty to give judgment first.

The question we have to consider is a short one, viz., whether the appellants were bound to take out a licence as being manufacturers of saccharin within the meaning of the Finance Act, 1901. I am of opinion that they are not manufacturers of saccharin. They were dealing with saccharin, and with saccharin only. They applied chemical treatment to it, and it remained saccharin afterwards. It was saccharin of a different strength, and that was the only alteration which they made in it. The word "manufactured" is first used in s. 5 of the Act, and it seems to me quite clear that "manufactured" and "made" in that section mean practically the same thing. That section provides that certain duty shall be charged, levied and paid "on glucose made in Great Britain or Ireland," "on saccharin made in Great Britain or Ireland," and "on a licence to be taken out annually by a manufacturer of any such glucose, or saccharin." Sub-s. 2 provides that "The duty on glucose may be charged either on the quantity actually manufactured"—that must mean the same as "made," because the duty is to be on what is made—"or by reference to the quantity ascertained by the Commissioners of Inland Revenue to be capable of being produced from the saccharin solution collected in a receiver to be provided by the maker and fixed and secured to the satisfaction of the Commissioners."

Was this saccharin made in Great Britain or Ireland? Take the case of imported saccharin. If 550 saccharin when produced from 330 imported saccharin has been made in Great Britain or Ireland, it follows that 550 saccharin produced from 330 saccharin which was made in Great Britain or Ireland has been twice made in Great Britain or Ireland, because there can be no difference whether 550 saccharin is made out of

imported saccharin or out of saccharin originally made in Great Britain or Ireland. The 550 saccharin would therefore be twice made in Great Britain or Ireland and twice manufactured, and, whether the Crown claim it or not, ought to pay duty twice. I do not think that was the intention of the statute of 1901. I think the word "manufactured" rather means bringing into being as saccharin. Sect. 7 of the Act of 1901 contains the expression: "Where any manufactured or prepared goods." Those words seem to me to shew that "preparation" might be said to be a different thing from "manufacture."

It is said that saccharin is a substance of very small bulk, and that its manufacture requires to be very carefully watched lest the Revenue should be defrauded; but it is to be observed that these sections relate not only to saccharin, but to glucose and invert sugar. Invert sugar is a very bulky article. Most careful protection is given by s. 8, because that section provides that the Commissioners may make regulations "as to the importation, labelling, wrapping, and *sale* of any saccharin . . . and as to the proof to be required that a label has not been previously used . . . and if any person imports or makes any such saccharin or delivers or uses molasses without complying with those regulations, or *sells, exposes for sale, or offers, or keeps for sale* any such saccharin in respect of which those regulations have not been complied with," a penalty shall be paid. Now these proceedings are taken under s. 9, which provides that "the Commissioners of Inland Revenue may make regulations prohibiting the *manufacture* of glucose, saccharin, or invert sugar" except by a person holding a licence. That obviously means the same "manufacture" as in s. 5, because s. 9 imposes a penalty on those who manufacture saccharin without taking out the licence mentioned in s. 5 as being subject to a duty of 1*l*.

We have to determine whether upon the facts stated in the case the appellants did manufacture saccharin. Let us see what those facts are. One of the admitted facts is that saccharin is a substance produced from toluene sulphonamide. That is the definition of saccharin. This saccharin was not produced by the appellants from toluene sulphonamide; it

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was produced (if it can be said to have been produced) from saccharin itself. The appellants have not manufactured saccharin from toluene sulphonamide. The case states that 330 saccharin is produced without eliminating certain para products, or only eliminating them to a very small extent. Then, in order to convert 330 saccharin into 550, certain of the para compounds have to be eliminated. Then it states that "this mixture" (that is, the 330) "is known commercially as 330 saccharin." The other mixture is known commercially as 550 saccharin. In both cases it is saccharin, and as a dutiable article 330 saccharin does not differ in the smallest degree from 550 saccharin. The same duty is payable on 550 saccharin as on 330 saccharin. What the appellants do is stated thus: "The appellants subjected certain 330 saccharin to a chemical process. . . . This amount of 330 saccharin was not treated in one bulk, but in separate quantities. The result of this treatment was that in some cases 550 saccharin was produced, and in some cases a mixture sweeter than 330 saccharin but not so sweet as 550 saccharin was produced," and in some cases less sweet. But it was always saccharin; it was saccharin before it was treated, and it was saccharin after it was treated.

On these grounds it seems to me the appellants are not manufacturers of saccharin within the meaning of the Act of 1901, at all events so as to be compelled to take out a licence.

DARLING J. I am of the same opinion. The question arises upon the words prohibiting the manufacture of glucose, saccharin, or invert sugar except by persons holding a licence.

The appellants, who, it is said, should have a licence, obtained something which was properly called saccharin when they got it, and they subjected it to a process at the end of which it differed in certain respects from what it was before; but it was saccharin still. It began by being saccharin, and it remained saccharin; it was not converted into something else, and to call it anything but saccharin after the process would be to misdescribe it. In these circumstances the question is whether the appellants manufactured the saccharin. In my opinion they did not. It seems to me that the words "manufacture" and "make" in the

Finance Act, 1901, are used as though they were absolutely synonymous. A licence is required to manufacture glucose or saccharin under s. 9 of the statute. By s. 5, sub-s. 1, a duty is payable on glucose and on saccharin made in Great Britain, and in sub-s. 2 the duty on glucose may be charged either on the quantity actually manufactured or by reference to the quantity ascertained in other ways. It is perfectly plain that the word "manufactured" is there used as synonymous with "made." Those words are used in the same section. The word "manufactured" is used in respect of glucose; the word "made" is used in respect of glucose and saccharin; and the word "manufactured" in the section is not used in regard to saccharin, because it is not necessary to go through that process which is gone through with regard to glucose in order to ascertain the duty chargeable. That is all.

I do not say that to use the word "manufacture" as exactly synonymous with the word "make," or to use the words "to manufacture" as exactly synonymous with the words "to make," is strictly grammatical, but I think that is what the statute has done. I think it possible that in a literary sense "to make" and "to manufacture" may not have precisely the same meaning. One can put cases where the word "manufacture" might be used in a somewhat strained way, but perhaps a little more scientifically. Take the case of a carpenter. A carpenter uses wood; he begins with wood; he makes the wood into boxes. What would you say if you wanted to talk of his manufacturing? Ordinary people would not say that he manufactured wood; they would say he manufactured boxes. But I am not quite sure it might not be strictly said that he manufactures the wood. He applies a process to it. I suppose etymologically "to manufacture" is "to make by hand." Everybody knows that you cannot absolutely make a thing by hand in the sense that you can create matter by hand, because in that sense you can make nothing: "Ex nihilo nihil fit." You can only make one thing out of another. I think the essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made. Even if it could be strictly said that the carpenter "manufactures" wood it could not be said that he

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"makes" wood. The same with a man who makes boots; he takes leather, and he makes it into boots. If he simply made leather into leather nobody could possibly say that he was a leather manufacturer, but it would be possible to say that a man who took leather and made it into boots manufactured leather but made boots. I think it would be possible to say that, and I am not sure it would not be strictly accurate, but I cannot read this statute in that way. Whether it would be possible to read "manufacture" etymologically as something very different from "make," I think the Act of 1901 uses "manufacture" and "make" as being convertible terms, and that a man who manufactures saccharin under s. 9 is doing the same thing as is called the making of saccharin under s. 5, or the manufacturing of glucose or saccharin under sub-s. 2 of s. 5, and that the appellants did not make saccharin, because they began and ended with saccharin. They did not "make" saccharin, and in my opinion, from the way in which the word is used by the statute, they did not manufacture saccharin, and therefore did not require a licence.

RIDLEY J. I am very sorry to find myself in conflict with the opinion of my learned brothers upon this point; but it is some satisfaction to reflect that that which occurred in the present case is not likely to happen frequently; for I understand that the importation of saccharin of 330 strength is not usual, and may not recur; and it is also some satisfaction to think that it is upon a very special subject that we are found to be in difference, namely, upon the meaning of the word "manufacture."

I cannot help thinking that the appellants did manufacture saccharin. It is difficult to define the word; and I shall not endeavour to find a better definition than has been given. I do not think the word is synonymous with "make." For example, you "make" a bridge, but you do not "manufacture" it. It is not the "manufacturing" of a bridge; it is the "making" of it. That is only one instance. It may be that in some particular instances the word "manufacture" is equivalent to "make." But we must endeavour to arrive at some sort of definition of "manufacture," and I think that where any

process of art is used upon some substance it is “manufactured.” To say that a person does not “manufacture” a thing because it has the same name after the process has been passed upon it as it had before seems to me—but I suppose I am wrong—to be simply a question of words. If there had happened to be another word for saccharin of the strength of 550, different from saccharin of the strength of 330, it would almost—I will not say quite—follow from the reasoning of my learned brothers that this would have been a manufacture. I cannot think that that is so. Take the case of the manufacture of steel; and let it be steel before it goes into the works: apply some process to it and it becomes a particular sort of steel. But it is steel both before and after, although steel of different qualities. Is not that the manufacture of steel? I should have thought so. Take the manufacture of wool. It is wool when it is on the sheep’s back; it is wool when it has passed through the process of sorting and picking which it has to go through in the mill. Is not that the manufacture of wool? I should have thought it most certainly was, although the name “wool” is applied to it both before the process begins and after it has ended.

I think, therefore, that this saccharin was “manufactured,” using the word in its ordinary sense. But I gather that some reliance is placed upon the opposite view for this reason—that it was already a commercial article when it was only of 330 strength, and that it could have been used in commerce without undergoing this process. The same remark applies to steel and to many other substances which may be quoted. They are manufactured although they could have been used in commerce before the process was passed upon them. For some commercial purposes which they knew would be beneficial to them the appellants changed the strength of this substance into another strength; and I think they were, in so doing, passing upon it a process of art, which, although it left it in the main the same substance, still was a manufacture of that saccharin.

That being so, in my opinion the word “manufacture” of saccharin does cover a process such as this. But I am aware we have to consider the meaning of the word “manufactured” in the Finance Act, 1901, where the word is used in the body of

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the Act in the same sense apparently as the word "made" in s. 5. I do not think that that consideration carries the matter a great deal further. I rather feel that we ought not to interfere with the ordinary sense of this word unless we can see something which compels us to do so. I cannot help thinking that in giving their decision as they have there has been some apprehension on the part of my brothers that another duty will be charged upon this stuff when it is made, as it has been said, for the second time. I do not know how that is, but I conceive I have nothing to do with it. I think the intention of the Legislature was to say that there shall be an inspection of the works belonging to persons who manufacture saccharin, and that in so dealing with the matter in s. 9 they were preventing the possibility of abuses such as those which have been indicated by the Attorney-General. I feel that with hardship or no hardship we have nothing to do. I think, however, the Legislature must give protection to the Revenue if it is required; but I understand it is not in practice required. I think that that sort of consideration ought not to influence us in our decision, if we should come to the conclusion that "manufacture" does include this sort of process.

I only desire to say one other word: "made" and "manufactured" appear to be used in the same sense in respect of the manufacture of glucose in s. 5 of the Act of 1901. Sub-s. 2 of that section provides that "The duty on glucose may be charged either on the quantity actually manufactured . . ." I think that the word "manufactured" must be read as equivalent to the word "made" in sub-s. 1 of the section, where it says "on glucose made." That refers to the result, and the words are in the case of glucose synonymous; but I cannot quite see why, if for the purposes of that section the two words are synonymous, it makes any difference to my reading of the word "manufacture" in s. 9. That section refers to the process. It is said "because you manufacture it, because you cause it to undergo a process, not because you make it, you ought to have the licence." The two sections appear to me to be dealing so far with a different subject-matter.

I can only say I have come to this conclusion with much

regret. I know it to be a subject of much doubt, or we should have been able to be in agreement upon it.

My learned brothers being of the other opinion, the result is that the appeal will be allowed.

*Conviction quashed.*

Solicitors for appellants: *H. Pumfrey Jones & Co., for W. J. Sharratt, Manchester.*

Solicitor for respondent: *Solicitor of Inland Revenue.*

J. E. A.

## THE KING v. MIDDLESEX JUSTICES.

*Ex parte* WALSALL UNION.

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*May 11, 14.*

*Poor Law—Pauper—Settlement—Division of Parish—Part of Parish added to other Parish by Order of County Council—Local Government Acts, 1888 (51 & 52 Vict. c. 41), ss. 57, 59, and 1894 (56 & 57 Vict. c. 73), ss. 36, 42.*

An order made by a county council or by a joint committee under s. 36 of the Local Government Act, 1894, and duly confirmed by the Local Government Board under s. 57 of the Local Government Act, 1888, with regard to a parish which at the passing of the Act of 1894 was situate in more than one urban district, may, in providing for the union of one of such parts of the parish with another parish, and the constitution of the remaining part into a separate parish, provide also that such alteration of the parish shall not have the effect of destroying settlements acquired therein prior to the coming into operation of the order.

RULE nisi for a mandamus directed to the justices of Middlesex sitting in quarter sessions requiring them to shew cause why they should not hear and determine an appeal from an order of justices adjudging the place of the last legal settlement of one Annie Olive Kent to be in the parish of Walsall and Walsall Union.

Annie Olive Kent was born on May 1, 1902, in the Brentford Union Workhouse. She was the illegitimate child of Sarah Anne Kent, who was the daughter of one Henry Kent. Sarah Anne Kent was born at Birmingham on April 16, 1880, and she attained the age of sixteen years on April 15, 1896, when she took the settlement of her father. Before the Local Government

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Act, 1894, came into operation, Henry Kent had a settlement in the parish of Walsall Foreign.

Before the Local Government Act, 1894, the parish of Walsall Foreign was one parish, part of which was situate in the municipal borough of Walsall and the other part in the urban sanitary district of Brownhills; and, as such parish was at the date of the passing of the Local Government Act, 1894, situate in more than one urban district, the parts of the parish in each district (subject to the order hereinafter mentioned) became separate parishes by virtue of s. 36, sub-s. 2, as from the appointed day in that Act mentioned.

In July, 1894, an order reciting a number of sections of the Local Government Acts, 1888 and 1894, was made by a joint committee of the county council of Stafford and of the council of the county borough of Walsall, which order was, with certain modifications, confirmed by the Local Government Board on October 19, 1894, and was to come into operation upon the appointed day as defined by s. 84 of the Local Government Act, 1894. The order so modified, after reciting that no petition had been presented against it, provided (*inter alia*) that that portion of the parish of Walsall Foreign which was in the urban sanitary district of Walsall county borough should be united with the parish of Walsall borough under the name or title of the parish of Walsall, and that the remaining portion of the parish in the urban sanitary district of Brownhills should be known as the parish of Walsall Wood. The order, as amended by the Local Government Board, further provided that the new parishes constituted by it should be included in and form part of the Walsall Union; and it also contained the following clauses:—

“9. Every person who has acquired or who on or before the date of the operation of the order shall acquire a settlement in any of the existing parishes mentioned in articles 1 and 2 of the order [these included the parish of Walsall Foreign] shall be deemed to have acquired a settlement in the parish comprising the place in which the acts or circumstances conferring such settlement shall have been done or occurred. If such acts or circumstances shall have been done or occurred in more than one place, such settlement shall be according as the last place of

residence of such person shall have been at the time of acquiring such settlement.

"10. Any person who shall have acquired a status of irremovability from any of the existing parishes mentioned in articles 1 and 2 of the order shall be deemed to have acquired a status of irremovability from the parish in which he shall reside on the date of the operation of the order, or (if he shall then be in receipt of relief) from the parish comprising the place in which he was residing at the time of becoming chargeable."

An order having been made by two justices for the removal of Annie Olive Kent from Brentford Union to Walsall Union, the guardians of Walsall Union appealed to quarter sessions. Upon the hearing of the appeal they contended that, by reason of the Local Government Act, 1894, the parish of Walsall Foreign, in which Henry Kent had a settlement, was destroyed, and that the settlement of Henry Kent and his daughter Sarah Anne Kent (the mother of Annie Olive Kent) in that parish was destroyed; that so far as the order of the joint committee purported to deal with the question of settlements it was ultra vires; and that, in consequence, the pauper, Annie Olive Kent, had no settlement in the parish of Walsall or in Walsall Union.

The quarter sessions, as appeared from affidavits filed in support of the rule, held that they had no jurisdiction to go behind the order of the joint committee, which had been duly confirmed by the Local Government Board, and they declined to hear counsel as to its validity, and in consequence dismissed the appeal. The present rule was then obtained at the instance of the guardians of the Walsall Union.

*Macmorran, K.C.*, and *R. Cunningham Glen*, for the Brentford guardians, shewed cause. The order of the joint committee was a valid order. The committee derived its power to make orders from s. 36, sub-s. 11, of the Local Government Act, 1894, and under sub-s. 1 of that section it was bound to take such a case as the present into consideration. Under sub-s. 2, unless for special reasons it was otherwise determined, the two portions of the old parish of Walsall Foreign would become two separate parishes in like manner as if they had been constituted separate

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parishes under the Divided Parishes Act, 1876. Under sub-s. 8 there is power to make provision by an order confirmed by the Local Government Board under s. 57 of the Local Government Act, 1888, for (inter alia) the union of part of a parish with another parish, and sub-s. 10 provides that any order so made shall be deemed to be an order made under s. 57. Sect. 57 of the Act of 1888 provides, by sub-s. 1 (b), for the making of an order for (inter alia) the transfer of part of a parish to another parish, and by sub-ss. 3, 4 and 5 such an order, if not successfully petitioned against, is to be confirmed (with any necessary modifications) by the Local Government Board.

Sect. 59 of the Act of 1888 provides (sub-s. 1) that "A scheme or order under this Act may make such administrative and judicial arrangements incidental to or consequential on any alteration of boundaries, authorities, or other matters made by the scheme or order as may seem expedient"; and by sub-s. 4 (d) of that section it is provided that any scheme or order made in pursuance of the Act "may provide for all matters which appear necessary or proper for bringing into operation and giving full effect to the scheme or order"; and clause (e) of the same subsection provides that the scheme or order "may adjust any property, debts, and liabilities affected by the scheme or order." The order in the present case comes within the provisions of s. 57 of the Act of 1888, the clauses preserving settlements in the former parish of Walsall Foreign being reasonably incident to the division of the parish. Even if the inclusion of such a matter were not incident to the division of the parish, nevertheless it must, by virtue of s. 42 of the Local Government Act, 1894 (1), be deemed to have been within the powers of the joint committee, more than six months having elapsed after its confirmation. The result is that the order, having been duly confirmed by the Local Government Board, could not be

(1) Sect. 42 of the Local Government Act, 1894, provides: "When an order under section fifty-seven of the Local Government Act, 1888, has been confirmed by the Local Government Board, such order shall at the expiration of six months from

that confirmation be presumed to have been duly made, and to be within the powers of that section, and no objections to the legality thereof shall be entertained in any legal proceeding whatever."

questioned by the quarter sessions, and the rule should be discharged.

[They referred to *Calne Union v. St. Mary, Islington, Guardians*. (1)]

*C. A. Russell, K.C.*, and *Disturnal*, for Walsall Union in support of the rule. There is nothing on the face of the order to shew that clauses 9 and 10 were made under s. 57 of the Local Government Act, 1888. Further, that Act does not deal with the law of settlement, which, involving as it does a question of status, is something wholly different from the various matters specifically dealt with in s. 57. The provisions of s. 59 shew that the orders referred to were only those dealing with administrative or judicial arrangements incident to alterations in areas, and the adjustment of property and liabilities. Sub-s. 4 (d) of s. 59, which is relied on as justifying the order, is not in point, for the order could have been carried into full effect without touching the law of settlement. Effect must be given to s. 36, sub-s. 2, of the Act of 1894, by which (in the absence of any special direction within the meaning of that sub-section) these two portions of the parish of Walsall Foreign became separate parishes as if they had been constituted such under the Divided Parishes Act, 1876, with the consequent result, which follows from *Dorking Union v. St. Saviour's Union* (2), that settlements in Walsall Foreign were destroyed on the coming into operation of the Act of 1894.

[LORD ALVERSTONE C.J. What effect do you give to s. 42 of that Act?]

That section only applies as to any excess of authority in dealing with a subject-matter within the scope of s. 57 of the Act of 1888. It cannot mean that if something wholly outside the scope of the Act is included in an order, the order cannot be questioned in any legal proceeding. In this case the question of settlement was outside the scope of the Act, and therefore the quarter sessions should have inquired into the validity of the order.

LORD ALVERSTONE C.J. The difficulty in this case arises from the involved nature of the legislation, and the impossibility of

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(1) (1900) 69 L. J. (Q.B.) 400.

(2) [1898] 1 Q. B. 594.

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repeating in an Act of Parliament applying to smaller areas certain provisions of the Local Government Act, 1888, necessary to make the legislation complete.

Acting under the Local Government Act, 1894, the joint committee of the two counties made an order which purported to be made under the powers of s. 36 of that Act. Sect. 36 specifies a number of states of circumstances under which powers as to alterations of areas may be exercised. The effect of that section, and in particular of sub-ss. 8 and 10, was to enable some order to be made with reference to the areas in question. That is not disputed. When the order was framed a clause was inserted dealing with settlements. That clause, as we are informed, was altered by the Local Government Board, who inserted the amended clauses 9 and 10 which took the place of the suggested clauses. Although power is given to petition against an order by persons who object to its terms and incidents, no petition was presented in this case.

It is contended that the order is bad. If we look at s. 57 of the Local Government Act, 1888, it seems clear to my mind that it was foreseen that there might be a number of matters which were not, and indeed could not be, specifically dealt with, and accordingly sub-s. 5 provides that the Local Government Board, on confirming an order, may make such modifications therein as they consider necessary for carrying into effect the objects of the order. Then comes s. 59, sub-s. 1 of which says that "A scheme or order under this Act may make such administrative and judicial arrangements incidental to or consequential on any alteration of boundaries, authorities, or other matters made by the scheme or order as may seem expedient." And by sub-ss. 4 (d) and (e) of the same section it is provided that a scheme or order "may provide for all matters which appear necessary or proper for bringing into operation and giving full effect to the scheme or order; and may adjust any property, debts and liabilities affected by the scheme or order."

It is said that inasmuch as there is no express power in the Acts to deal with the question of settlements, the county councils and Local Government Board had no power to deal with it in the order. *Prima facie* much is to be said in favour of that

view. It is right, however, to point out that, assuming, as we must do, that the Legislature were acting with a full knowledge of the existing law, s. 36, sub-s. 2, of the Local Government Act, 1894, specifies a case as to which it can scarcely be said that the question of settlement has been overlooked, for it is there provided that where a parish is at the passing of the Act in more than one urban district, each part shall, unless the county council for special reasons otherwise directs, and subject to any alteration of area made by or in pursuance of that or any other Act, be separate parishes in like manner as if they had been constituted such under the Divided Parishes Act, 1876. If the two parts of the parish did become separate parishes, undoubtedly the question of settlement would be affected. But the section contains the words "unless the county council for special reasons otherwise direct"; and, therefore, I think the Legislature must be deemed to have contemplated this question of settlement being dealt with. I think that, when it is fairly looked at, the Act of 1894, incorporating as it does the provisions of the Act of 1888, gives county councils and the Local Government Board, subject to the consideration of objections, power to deal with this kind of matter.

Then comes the very general s. 42, a difficult section to construe when we endeavour to lay down its exact limits. [His Lordship read the section, and continued:—] It may be that a question something like the one raised in the present case had been raised, and it was thought desirable that these incidental matters should not be the subject of perpetual disputes, and therefore it was intended to confirm the quasi-legislative powers of the Local Government Board under such an order as the present. This to a certain extent confirms the view expressed by Channell J. during the argument, that, inasmuch as the Legislature foresaw that it could not deal with all matters, it was intended that someone should have power to deal with such a matter as this. In arriving at this conclusion I am much pressed by the fact that if there is no such power very absurd consequences would follow. The law of settlement may be strange and anomalous, but still there it is. As long as a parish is undivided certain consequences follow, and the question

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of settlement seems to me to have been considered one of those things incidental to the making of a division of the parish. I think it was incidental to the powers which the county councils and the Local Government Board had and were able to exercise. I do not, of course, mean to suggest that s. 42 would cure everything; I can imagine things being put into an order so foreign to its main purpose as not to be *intra vires*. But in my judgment this order was within the powers conferred by the statutes, and the view expressed by the quarter sessions that it was binding upon them ought to be affirmed.

A similar order was made in *Calne Union v. St. Mary, Islington Guardians* (1), and, although the point as to the validity of the order was not taken in that case, it is clear that such orders have been made without objection for some considerable time, and it is only in consequence of the decision in *Dorking Union v. St. Saviour's Union* (2) that it has been suggested that such an Order is *ultra vires*. I do not think that that case is altogether satisfactory. The House of Lords in *West Ham Union v. London County Council* (3) did not purport to overrule it, but said that they would keep an open mind with regard to it, and they suggested that it proceeded upon an erroneous view. I mention this, not as affording a direct argument in favour of the view which I am expressing, but as shewing that the consideration of the consequences, if the matter be not dealt with in an order where a parish is divided, would point to its being reasonable that some adjustment should be made. I therefore come to the conclusion that clauses 9 and 10 of the order were not *ultra vires*, and that under s. 42, it was too late to question them, and that the order is therefore good. The rule must be discharged.

DARLING J. I am of the same opinion.

CHANNELL J. I agree, and have nothing to add on the general question. I only desire to refer to the case of *Howlett v. Maidstone Corporation* (4), which illustrates what has been decided as

(1) 69 L. J. Q. B. 400.

(2) [1898] 1 Q. B. 594.

(3) [1904] A. C. 40.

(4) [1891] 2 Q. B. 110.

to the general construction of these Acts. The decision there was that the effect of the Local Government Act, 1888, had been to take away from a committee of visitors of a county lunatic asylum the power formerly possessed by them of fixing the amount to be paid for the maintenance of lunatics sent to the county asylum by a borough which had not contributed towards the cost of the asylum, the Court holding that a dispute between the county and the borough as to such cost was a matter to be adjusted under s. 62 of the Act of 1888. The Court held that s. 62, which is somewhat similar in terms to the section we are considering, was wide enough to cover such a question. The case is an illustration of the view that it was intended by the Legislature to provide some general power of dealing with matters incidentally arising from the exercise of powers given by the Act.

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*Rule discharged.*

Solicitors for Brentford guardians : *Ruston, Clark & Ruston.*

Solicitors for Walsall Union : *Smiles & Co., for A. H. Lewis, Walsall.*

W. J. B.

C. A.

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July 11.

[IN THE COURT OF APPEAL.]

GREENER (AS TRUSTEE OF HARRIS GOLDBERG) v.  
E. KAHN & CO., LIMITED.*Practice—Security for Costs—Insolvent Plaintiff—Trustee of Deed of Assignment.*

The trustee of a deed of assignment of the property of another, upon trust for the creditors of the assignor, is not, if shewn to be insolvent, exempt from liability to give security for the costs of an action brought to carry out the trusts of the deed.

APPEAL from an order of Phillimore J. at chambers.

The action was brought by the plaintiff as trustee of one Harris Goldberg. It appeared that Goldberg being in financial difficulties executed a deed of assignment whereby he assigned to the plaintiff all his property upon trust for the benefit of his creditors. The plaintiff was, among other things, to collect all book and other debts, and the action was brought to recover from the defendants certain debts and other moneys alleged to have been due from them to Goldberg. The trusts concerning the moneys to arise from the sale and conversion of the property assigned by the deed were, in the first place, to pay the expenses of such sales and conversion; in the next place, to retain all costs, charges and expenses of and incidental to the negotiation, preparation and execution of the deed, and of carrying the same into effect, and all other expenses to be incurred in the execution of the trusts of the deed; in the next place, to pay such creditors as would be entitled to be paid in priority to other debts in case of bankruptcy; and to divide the residue among the creditors assenting to the deed.

The defendants applied at chambers for an order that the plaintiff should give security for the costs of the action, upon the ground that he was an undischarged bankrupt. The learned judge refused to make such an order, but gave leave to appeal.

The defendants appealed.

July 10. *Rawlinson, K.C.* (with him *Harry Dobb*), for the defendants. The general rule is that an insolvent, suing as

nominal plaintiff for the benefit of another, can be called on to give security for the costs of the action: *Cowell v. Taylor*. (1) There are exceptions, but they do not cover this case. An insolvent trustee in bankruptcy or an insolvent liquidator has statutory duties, but the present plaintiff owes his position to the fact that Goldberg has selected him as trustee. He is under no obligation to any Court, or to any Government body such as the Board of Trade; nor has he any statutory duties, and there is no authority that such a case should be treated as an exception to the general rule. [He also referred to *Lloyd v. Hathern Station Brick Co.* (2)]

*Scarlett*, for the plaintiff. The plaintiff is trustee for the creditors of the assignor, and the trusts of the deed are to realize the property and debts, and first to pay the costs, charges and expenses incurred by him as trustee, then to pay the preferential creditors, and then creditors generally. There is no difference in principle between such a case and that of a trustee in bankruptcy or a liquidator. The plaintiff is not a shadow or mere nominal plaintiff, but has a beneficial interest in the result of the action. A liquidator in a voluntary liquidation can be removed, but in other respects his position and that of the plaintiff are alike, and poverty is no bar to proceedings by such a liquidator: *In re Strand Wood Co.* (3) The case of *Lloyd v. Hathern Station Brick Co.* (2) was a converse case to the present, for the plaintiff in that action parted with his interest and became a mere nominal plaintiff suing for the benefit of third persons. The decision has no bearing on this case. An insolvent plaintiff, though there is a receiver of assets, is not necessarily called on to give security: *Rhodes v. Dawson* (4); nor is a bankrupt whose discharge has been suspended: *Cook v. Whellock* (5); nor is an undischarged bankrupt claiming damages in a divorce suit: *Blackett v. Blakett* (6); and by analogy to those cases the plaintiff ought not to be called on to give security, and the order of the learned judge should stand.

*Rawlinson, K.C.*, in reply.

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(1) (1885) 31 Ch. D. 34.

(2) (1901) 85 L. T. 158.

(3) [1904] 2 Ch. 1.

(4) (1886) 16 Q. B. D. 548.

(5) (1890) 24 Q. B. D. 658.

(6) [1902] P. 170.



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July 11. COLLINS M.R. This is an appeal from an order of Phillimore J., who has refused an application that the plaintiff should be ordered to give security for the costs of the action.

The case is somewhat peculiar, and we are told that there is no reported decision in point. The plaintiff is an undischarged bankrupt who was selected by a man of the name of Goldberg as his trustee of a deed of assignment for the benefit of his creditors. The plaintiff's duty as trustee would be to collect the assets and to distribute them among the creditors of Goldberg, and he has brought this action in respect of a debt alleged to be due from the defendants to Goldberg. The question is whether under the circumstances of the case it is right that the plaintiff should be called on to give security for the costs of the action.

It is pointed out on behalf of the defendants that the plaintiff is a mere trustee for another person, without any personal interest in the subject-matter of the claim in the action, and therefore that the case is one in which security for costs may be ordered. On the other side it is said that the case comes within the exceptions to the rule as to requiring security for costs in cases in which an impecunious person sues on behalf of someone else, for instance, the cases of a trustee in bankruptcy and a liquidator, who are not called on to give security. It seems to me that the plaintiff does not come within the exceptions to the rule, and he has not been able to adduce any authority to support his claim to exemption from liability to provide for the costs of the litigation. He cannot be in a better position under the deed than if he were merely acting in the interest of one person. On the face of the mandate he is a trustee for the assignor, but he has to distribute the assets among the creditors of the assignor, and to that extent he is a trustee for those creditors. The principle upon which immunity from giving security for costs depends is stated in *Cowell v. Taylor* (1), which is the leading case on the subject. Bowen L.J. in his judgment in that case pointed out that as a general rule poverty is no bar to a litigant, though there is an exception in the case of appeals, to prevent an insolvent person from dragging his opponent from one Court to another. He added: "There is also an exception

introduced in order to prevent abuse, that if an insolvent sues as nominal plaintiff for the benefit of someone else, he must give security. In that case the nominal plaintiff is a mere shadow. The two most familiar classes of cases of this kind are cases where a person has divested himself of his interest, and handed it over to someone else, that the transferee may sue for him, and cases where a person who has commenced a suit divests himself of his interest during the course of the suit in order that another person may carry it on for his benefit. Those are the common cases, I do not say that there may not be others. In those cases Courts of Common Law required security for costs to be given." The learned Lord Justice later on in his judgment pointed out that it has been an established practice, both at law and in equity, to allow a trustee in bankruptcy to sue without giving security for costs. Is there any analogy between the case of a trustee in bankruptcy or a liquidator and the case of an assignee who derives his rights by an agreement inter partes without the intervention of the Legislature? Such a case comes within the first class mentioned by the Lord Justice, that of a nominal plaintiff suing for the benefit of someone else. Such a plaintiff cannot claim the immunity accorded to a trustee in bankruptcy, who acts under a mandate imposed by the Legislature. The trustee in bankruptcy is in the hands of the statute that brought him into existence as a trustee, and there is abundant reason why, that being so, he should not be called on to give security. The reasons for immunity in the case of a trustee in bankruptcy have no application to the case of a person who owes his position to the mandate of another person, and not to any legislative enactment. I think it is clear that the plaintiff does not come within any exception to the general rule that, if an insolvent sues as nominal plaintiff for the benefit of someone else, he must give security. There is no question raised as to the fact of the insolvency of the plaintiff, and the appeal must be allowed, and there must be an order that the plaintiff must find security for the costs of the action, the amount to be determined by a Master.

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COZENS-HARDY L.J. I am of the same opinion. It is rather remarkable that this point comes up now for the first time for

C. A.      judicial decision. There is a general principle founded on good  
1906      sense that where one person entrusts another with a mandate to  
GREENER      collect and distribute the debts of the former, and the person so  
v.      entrusted is an insolvent, he may be called on to give security  
E. KAHN &      for the costs of any action that he may bring in order to collect  
CO.,      any of the debts. The plaintiff who is suing in this action is a  
LIMITED.      person to whom such a mandate has been given, in the first  
Cozens-Hardy      place by Goldberg, the assignor, who confesses thereby that he  
L.J.      is impecunious, and in the second place it may be said that there  
is a mandate from the creditors of the assignor who take the  
benefit of the deed. Whichever way the case is looked at, there  
is property vested in the plaintiff, not for his own benefit, but for  
the benefit of others. Why, if the plaintiff is shewn to be insol-  
vent, as he certainly is, should he not give security? The rule  
is stated by Bovill C.J. in *Sykes v. Sykes* (1), and is quoted by  
Bowen L.J. in *Cowell v. Taylor* (2), thus: "To entitle a defend-  
ant to security, he must shew not only that the plaintiff is  
insolvent, but also that he is suing as a nominal plaintiff, in the  
sense of another person being beneficially interested in the  
result of the action. In that case, the Court would stay the  
proceedings until security is given." To that rule there are  
exceptions, as, for instance, the case of a trustee in bankruptcy,  
under statutory authority, and with duties thrown upon him  
which he might not be able to discharge if he were required to  
give security for costs. The same exception to the general rule  
is applicable to the cases of an executor and of a liquidator,  
whether voluntary or not, for in either case the liquidator is the  
creation of a statute. For my part I am not prepared to extend  
the exceptions further than I am bound to go. It is then urged  
that the plaintiff is not without interest in the subject-matter of  
the action, because out of the money that comes into his hands  
he is entitled to indemnify himself against costs, charges and  
expenses incurred by him in carrying out the provisions of the  
deed. That is not the sense in which the words "beneficially  
interested" are used in stating the rule, for if it were otherwise  
the rule itself would generally be inoperative. Where a trustee  
or agent is taking proceedings in the trust or agency in which

(1) (1869) L. R. 4 C. P. 645.

(2) 31 Ch. D. 34.

he is acting he has a right to indemnify himself against the costs of those proceedings, but that does not give him a beneficial interest in the subject-matter so as to make the case other than that of a nominal plaintiff suing for the benefit of someone else. This case, therefore, is not within the exceptions to the rule that if such a plaintiff is insolvent he must give security, and the appeal against the order of the learned judge, refusing the application as to the giving of security, must be allowed.

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Cozens-Hardy  
L.J.

*Appeal allowed.*

Solicitor for plaintiff: *Arthur B. Crundall.*

Solicitor for defendants: *Julius A. White.*

A. M.

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THE MAYOR, ALDERMEN AND COUNCILLORS OF THE  
CITY OF WESTMINSTER v. LONDON COUNTY  
COUNCIL.

1906  
May 3, 25.

*London—Sewer—Pollution of River by Sewage—Duties of County Council—Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 135—Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), s. 1.*

Under s. 135 of the Metropolis Management Act, 1855, and s. 1 of the Metropolis Management Amendment Act, 1858, the London County Council, as successors of the Metropolitan Board of Works, have a discretion to decide what sewers and works are necessary in carrying out their duties with regard to the prevention of the sewage of the metropolis from flowing into the Thames; and therefore they are not bound to construct sewers which would be properly district sewers for the purpose of intercepting the drainage of every house in the metropolis that in 1855 drained into the Thames.

SPECIAL case stated in an action.

In 1849 the owner of three houses, now known as 102, 103 and 104, Grosvenor Road, Pimlico, with the consent of the Metropolitan Commissioners of Sewers, made a drain by which the sewage of the three houses was discharged into the Thames. By the special case it was to be taken that this drain was at the passing of the Metropolis Management Act, 1855, a drain for draining a group of houses by a combined operation laid before



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January 1, 1856, with the sanction and approval of the Metropolitan Commissioners of Sewers.

About 1870 All Saints' Church, near 104, Grosvenor Road, was built, and at some time subsequently a drain from the church was connected at a manhole with the said drain from the houses, by means of which the sewage from the church was discharged into the Thames, together with the sewage from the said houses. It could not be stated whether the said drain from the church and its connection with the pipe leading from the manhole into the river was constructed with or without the knowledge or consent of the vestry of St. George, Hanover Square. The Grosvenor Road houses and the said church were within the parish of St. George, Hanover Square, and under the London Government Act of 1899 the powers and duties of the elective vestry of that parish were transferred to, and are vested now in, the Westminster City Council. The sewage from the said houses and church passed into the river through a flap, which opened at low tide, but at high tide was closed by the pressure of the water. Before 1899 the vestry of St. George, Hanover Square, and after 1899 the Westminster City Council, took steps to ensure the efficient working of the said flap. With that exception the Westminster City Council had done no acts of interference with or control over the drainage of the said houses. Having regard to the Thames Conservancy Act, 1894 (57 & 58 Vict. c. clxxxvii.), the only practicable mode of disposing of sewage from the said houses and church was to bring such sewage into the metropolitan main drainage system at the Lupus Street sewer.

In 1895 the Divisional Court (Wright J. and Kennedy J.) held that the London County Council had no power to order the vestry of St. George's, Hanover Square, to construct a sewer commencing opposite 102, Grosvenor Road, and terminating in the Lupus Street low level sewer belonging to the County Council: *Reg. v. Vestry of St. George's, Hanover Square*. (1) On October 13, 1903, the conservators of the river Thames, acting under s. 94 of the Thames Conservancy Act, 1894, served a written notice on the plaintiffs requiring them to discontinue within three months the flow of sewage into the

(1) [1895] 2 Q. B. 275.

Thames from the sewer taking the drainage of the three houses, and in consequence of this the plaintiffs ceased to take steps to provide that the drainage of the three houses discharged itself into the Thames by means of the opening or flap referred to.

The plaintiffs had since constructed a sewer by which the sewage of the three houses and the church passed into the plaintiffs' sewer in Rutland Street, and so into the defendants' low level sewer in Lupus Street. The cost of this new sewer amounted to 627*l.* 4*s.* If the defendants were under a legal liability to provide means of preventing the sewage of the three houses and the church from passing into the river the said sum of 627*l.* 4*s.* was to be taken to have been paid for the defendants at their request. The question for the opinion of the Court was whether the defendants were under a legal liability to provide means of preventing the sewage of the three houses and the church from passing into the Thames.

May 3. *Macmorran, K.C.* (*Colam* with him), for the plaintiffs. The drain of these three houses, which was constructed before 1855, was not a "sewer" so as to become vested under s. 68 of the Metropolis Management Act, 1855, in the vestry, whose powers and duties are now transferred to the plaintiffs. It is suggested that the connection of the drain with the church in 1870 converted it into a sewer, but such a connection, made without the consent of the vestry, could not affect their duties. But it is unnecessary to consider by whom the sewage has been sent down this drain. The real question is, on whom is the duty of preventing the sewage from being discharged into the river? Under s. 135 of the Metropolis Management Act, 1855, the Metropolitan Board of Works were to make "such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames." That provision might have been interpreted as merely giving a power to the Board of Works, and therefore s. 1 of the Metropolis Management Amendment Act, 1858 (1), was passed for the purpose of definitely casting

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(1) By the Metropolis Management Amendment Act, 1858 (21 & 22 Vict. c. 104), s. 1, "The Metropolitan Board shall cause to be commenced

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upon the Board the obligation of carrying out the works necessary for preventing the sewage of the metropolis from being discharged into the river. The plaintiffs' duty was fulfilled when the houses in question were properly drained. They have no duties with regard to the pollution of the river. It is the duty of the defendants to see to that. That duty has existed since the passing of the Act of 1858, apart from any of the powers given to the Thames Conservators by s. 94 of the Thames Conservancy Act, 1894, to enforce the discontinuance of the pollution of the river by sewage. The question in *Reg. v. Vestry of St. George, Hanover Square* (1), was as to the validity of an order made upon the vestry by the London County Council for the construction of a new sewer. That order purported to be made under s. 138 of the Act of 1855, and the decision does not affect the present question.

*English Harrison, K.C.*, and *Daldy*, for the defendants. When the connection of the church with this drain was made in 1870, without any order by the vestry for combined drainage, the drain became a sewer from the point of connection down to the river: *Holland v. Lazarus*. (2) It therefore became vested in the vestry under ss. 68 and 69 of the Act of 1855. The plaintiffs have recognized that fact, because up to 1903 they attended to the sewer and its flap, to see that they were in proper working order. A small sewer like this does not come within the provisions of s. 135 of the Act of 1855. The scheme of that Act was that the main drainage of the metropolis was to be attended to by the Metropolitan Board of Works, while the local sewers were to be in the care of the vestries. Sect. 135 of the Act of 1855 and s. 1 of the Act of 1858 deal solely with the duty of the Board to make a system of main drainage in such a way that sewage shall not be discharged into the Thames:

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as soon as may be after the passing of this Act, and to be carried on and completed with all convenient speed according to such plan as to them may seem proper, the necessary sewers and works for the improvement of the main drainage

of the metropolis, and for preventing, as far as may be practicable, the sewage of the metropolis from passing into the river Thames within the metropolis."

(1) [1895] 2 Q. B. 275.

(2) (1897) 66 L. J. (Q.B.) 285.

*London County Council v. Lee District Board of Works.* (1)  
Under s. 135 the Board were given a discretion as to the sewage works to be made by them for that purpose, and there is no ground for saying that that discretion was taken away by s. 1 of the Act of 1858. Under s. 138 of the Act of 1855 the defendants have a general right of supervision enabling them to compel the local authorities to make sewers which will discharge into the main lines of metropolitan drainage. [They referred also to *Kirkheaton District Local Board v. Ainley, Sons & Co.* (2)]

*Macmorran, K.C.*, in reply. A connection wrongfully made with a drain will not convert it into a sewer: *Heaver v. Fulham Borough Council.* (3)

*Cur. adv. vult.*

May 25. BRAY J. read the following judgment:—This is a special case stated in an action by the Mayor, &c., of the City of Westminster against the London County Council, and the question I have to decide is thus stated in the case—viz., whether the London County Council was under a legal liability to provide means of preventing the sewage of certain houses in Grosvenor Road and of All Saints' Church from passing into the river Thames. The plaintiffs allege that this liability is created by s. 135 of the Metropolis Management Act, 1855, or by s. 1 of the Amendment Act of 1858. Previous to the passing of the Act of 1855 two bodies, the Commissioners of Sewers of the City of London and the Metropolitan Commissioners of Sewers, had constructed certain main sewers, and the sewage from many of those sewers passed directly into the Thames. The Metropolitan Board of Works was created by s. 43 of the Act of 1855, and by s. 135 the main sewers before mentioned were vested in it. The section then proceeded as follows: "Such Board shall make such sewers and works as they may think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis." At the time of the passing of the Act

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(1) In the House of Lords, not reported. On June 27, 1901, the case having been argued, but before judgment was given, the judgment of the Court of Appeal ((1899) 82 L. T. 306) was, by consent, reversed.

(2) [1892] 2 Q. B. 274.

(3) [1904] 2 K. B. 383.



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the sewage from the houses now known as 102, 103, and 104, Grosvenor Road, was passing directly into the river Thames by a drain made with the consent of the Commissioners of Sewers, and the contention is that the Metropolitan Board of Works should have constructed a main or intercepting sewer to take this sewage, and as they did not do so, but carried their intercepting sewer along Lupus Street instead of along Grosvenor Road, that they, or, rather, their successors, the London County Council, can now be compelled to construct a main sewer to prevent this sewage from passing into the Thames. In my opinion s. 135 did not compel the Board to lay a main sewer to intercept this sewage. The section states "such sewers and works as they may think necessary"—that is to say, it was for them to decide what sewers and works were necessary. They did in 1869 lay in Lupus Street a sewer sufficiently low to take this sewage by means of a sewer along what was afterwards known as Rutland Street, and they might in their discretion think such a sewer as the low level Lupus Street sewer was all that was necessary. It was for the vestries and district boards under s. 69 to make the necessary sewers for effectually draining their parishes or districts, and the Metropolitan Board of Works was not in my opinion bound to lay a main sewer so as to intercept the drain of every house that drained into the river Thames. More reliance, however, was placed on s. 1 of the Act of 1858. That section runs as follows: "The Metropolitan Board shall cause to be commenced as soon as may be after the passing of this Act, and to be carried on and completed with all convenient speed according to such plan as to them may seem proper, the necessary sewers and works for the improvement of the main drainage of the metropolis, and for preventing, as far as may be practicable, the sewage of the metropolis from passing into the river Thames within the metropolis." It does not contain the words "as they may think necessary," but "according to such plan as to them may seem proper," and later there are the words "as far as may be practicable." It was not, in my opinion, intended by this section to take away from the Board the discretion they formerly had. The object of the statute appears from the preamble, viz., that the works which

the Board had been authorized to carry out by the Act of 1855 should be speedily undertaken and completed; and I think "the necessary sewers and works" in s. 1 only meant the same necessary sewers and works as had been mentioned in s. 135 of the Act of 1855, viz., such as the Board might think necessary. To give the Act any other construction would oblige the Board to construct many sewers which would be properly district sewers, and not main sewers, and sufficient in number and extent to take the sewage of every house that at that time drained into the river Thames. I am satisfied that was not intended, and in my opinion the words of the section do not compel me to adopt such a construction. There must, therefore, be judgment for the defendants in the action with costs.

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*Judgment for the defendants.*

Solicitors for plaintiffs: *Allen & Son.*

Solicitor for defendants: *Seager Berry.*

A. P. P. K.

[CROWN CASE RESERVED.]

THE KING *v.* JOSEPH MURRAY AND OTHERS.

1906  
May 26.

*Criminal Law—Larceny—Indictment—Goods the Separate Property of the Wife described as being the Property of her Husband—Amendment—The Criminal Procedure Act, 1851 (14 & 15 Vict. c. 100), s. 1.*

Where goods which were the separate property of a wife were stolen from the house of her husband, in which she was residing, it is not sufficient to lay them in the indictment as the property of the husband.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by the Deputy Recorder of Carlisle.

"1. At the Easter General Quarter Sessions of the Peace holden for the City of Carlisle on the 4th day of April, 1906, five prisoners named Joseph Murray, David Rowe, Martin Nicholson, William Hodgson, and Joseph William Jeffery, were jointly arraigned and tried before me sitting as deputy recorder on an indictment for felony to which they all severally pleaded not guilty.

"2. The indictment contained two counts: the first count

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charged the prisoners with feloniously breaking and entering the dwelling-house of one Isaac Huntington, and therein feloniously stealing two gold rings and one gold necklet, together of the value of 4*l.*, of the goods and chattels of the said Isaac Huntington, the second count charged the prisoners with feloniously receiving two gold rings and one gold necklet, together of the value of 4*l.*, of the goods and chattels of the said Isaac Huntington, well knowing the same to have been feloniously stolen from the dwelling-house of the said Isaac Huntington.

“3. From the evidence of the said Isaac Huntington and his wife, who were called as witnesses on behalf of the prosecution, it appeared that the dwelling-house belonged to the husband but that each of the several articles alleged to have been feloniously stolen and received was the separate property of the wife, to whom they had been given, some before and some after her marriage, which took place after the commencement of the Married Women’s Property Act, 1882. It also appeared from the evidence that the husband and wife were living together in the said dwelling-house on the day when the alleged crime was committed and that none of the said articles, consisting as they did of the wife’s wedding ring keeper ring and necklet, were susceptible of the husband’s personal use and enjoyment.

“4. On this evidence I invited counsel for the Crown to explain how the charge could be sustained, as it seemed to me that according to the principle stated by the Court of Appeal in *Ramsay v. Margrett* (1) the property of the wife attracted the possession so as to preclude any right which would justify the property being laid in the husband.

“5. In reply it was argued that the above authority related only to civil and not to criminal proceedings and that for the purposes of the latter the husband, from whose house the goods were taken, had ipso facto such possession or custody thereof as made the goods his as against a thief or felonious receiver.

“6. I thereupon allowed the trial to proceed with an intimation that I should consider the propriety of granting a case on the point should the prisoners or any of them be convicted.

“7. At the close of the evidence and after several of the

prisoners had gone into the witness box but before verdict given, counsel for the Crown for the first time applied for leave to amend the indictment under 14 & 15 Vict. c. 100, s. 1, by substituting the wife in place of the husband as owner of the said goods.

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"8. I declined to allow any amendment as I doubted whether a variance in ownership of so material a character fell within the statute, and was at any rate satisfied an amendment, at such a stage and in the circumstances, would unfairly prejudice the prisoners, who were all undefended by counsel, in their defence.

"9. In summing up I explained to the jury as admitted by the prosecution that there was little if any evidence against the prisoners on the first count in the indictment, and that they should more particularly direct their attention to the charge under the second count. The jury however found a general verdict of guilty against all the prisoners, upon whom I thereupon passed several sentences varying from three to twelve months' hard labour, which they are now undergoing.

"10. At the trial no evidence was adduced of any bailment or other transaction which could confer on the husband any special property or interest in the said goods or give him any lien thereon, nor was any authority cited to shew that cases under the old law founded on the mere relationship of husband and wife or of his ownership of the house in which they lived (cf. *Rex v. French* (1); *Rex v. Wilford* (2)) had any application in view of the legal estates and interests which a wife might acquire under the Married Women's Property Act, 1882 (cf. ss. 1, 12, 16; *Larner v. Larner* (3)), so as to permit the property in the said goods being laid in the husband (cf. *Sill v. Reg.* (4); *Reg. v. Ward* (5)).

"11. The question for the opinion of the Court is whether on the facts hereinbefore stated the property in the goods alleged to have been feloniously stolen and received was rightly laid by the said indictment in the said Isaac Huntington.

"If the Court answers this question in the affirmative the

(1) (1822) R. & R. 491.

(3) [1905] 2 K. B. 539.

(2) (1823) R. & R. 517.

(4) (1853) 17 Jur. 207.

(5) (1857) 7 Cox, 421.



1906 <hr/> REX v. MURRAY.	conviction and judgment are to stand, otherwise the same are to be quashed."
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LORD ALVERSTONE C.J. I much regret that this conviction must be quashed. I think it right to express our strong opinion that the leave to amend the indictment which was asked for ought to have been granted. The case falls distinctly within the language of s. 1 of 14 & 15 Vict. c. 100, which in express words allows an amendment in the ownership of any property described in the indictment, and it is difficult to see on what ground it could be contended that such an amendment would unfairly prejudice the prisoners, merely because the true ownership of the goods was incorrectly stated in the indictment. But, taking the original indictment as it stands and without amendment, the ownership of the property is alleged to be in the husband, and it becomes necessary to consider the question from the point of view whether it is sufficient that goods which were in fact the separate property of the wife, but which were found in his house at the time the felony was committed, should be described as being his property. It is expressly stated in the case that there was no evidence of any bailment or other transaction which would confer any special property on the husband, and in order to maintain the conviction it would be necessary to say that the mere fact that the goods were in the husband's house was sufficient to make it right to lay the property in him. The Married Women's Property Act, 1882, so far as it affects the matter, puts the wife in respect of her separate property in the position of a third person. Sect. 12 of the Act is consistent with the view that the separate property of the wife is to be regarded as if it were the property of a third person. It seems to me not sufficient, in order to support this indictment, to shew that the wife's separate property which was stolen was taken from the house of her husband.

The conviction must therefore be quashed.

I desire to say that if there had been no evidence that the goods were the separate property of the wife, the fact that they

were in the husband's house might have been sufficient evidence of property in them for the purpose of the indictment.

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KENNEDY, RIDLEY, DARLING, and JELF JJ. concurred.

BRAY J. I agree, but I wish to guard myself from saying that the fact that goods are found in the house of the husband may not be good and sufficient evidence that the goods are his property.

A. T. LAWRENCE J. I agree.

*Conviction quashed.*

A. P. P. K.

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[CROWN CASE RESERVED.]

THE KING v. JOHN BOND.

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 May 26 ;  
June 12.

*Criminal Law—Using Instruments with intent to procure Abortion—Admissibility of Evidence of felonious use of similar Instruments on another Woman on a previous Occasion.*

The prisoner, a medical man, was indicted for feloniously using certain instruments on a certain woman with intent to procure her miscarriage. At the trial evidence was tendered on behalf of the prosecution to shew that some nine months previously the prisoner had used similar instruments upon another woman with the avowed intention of bringing about her miscarriage, and that he had then used expressions tending to shew that he was in the habit of performing similar operations for the same illegal purpose. The evidence was admitted, and the prisoner was convicted :—

*Held*, by Kennedy, Darling, Jelf, Bray, and A. T. Lawrence JJ. (Lord Alverstone C.J. and Ridley J. dissenting), that the evidence was rightly admitted, and that the conviction must be upheld.

CASE stated for the opinion of the Court for the Consideration of Crown Cases Reserved by A. T. Lawrence J.

“John Bond was tried before me at Chester at the winter assizes holden for the county of Chester on the 15th and 16th of March, 1906, on an indictment under s. 58 of the Offences against the Person Act, 1861 (24 & 25 Vict. c. 100), for feloniously using instruments upon one Ethel Annie Jones with intent thereby to procure the miscarriage of the said Ethel Annie Jones on the 20th day of October, 1905. Evidence of admissions by the prisoner of the use of instruments upon the said

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Ethel Annie Jones was given by the witnesses for the prosecution, but it was suggested that such use was for a lawful purpose and with no criminal intent. The evidence of one Gertrude Sandles Taylor was tendered for the prosecution to shew intent. It was objected to by the learned counsel for the prisoner on the ground that such evidence was inadmissible, inasmuch as there were other indictments awaiting trial against the prisoner for offences against the same statute in respect of acts alleged to have been done by the prisoner to the said Gertrude Sandles Taylor in January, 1905, that such acts had no reference to Ethel Annie Jones and were not evidence of the intent with which the prisoner had used the instruments upon the said Ethel Annie Jones. I was of opinion, upon the authority of *Reg. v. Geering* (1) and the other cases cited to me, that the evidence was admissible. The evidence of Gertrude Sandles Taylor was given. A copy of my note of such evidence accompanies this case, and may be referred to as part thereof. I left the question to the jury as to whether or not the prisoner had used the instruments with the intent alleged in the indictment, and told them that unless they were satisfied he had such intent they should find him not guilty. The jury found the prisoner guilty. I sentenced him to three years' penal servitude, but respited the execution of the sentence until after the decision of this case. I admitted the prisoner to bail. The question for the opinion of the Court is whether the evidence of Gertrude Sandles Taylor was admissible. If the evidence was admissible the conviction is to stand: if inadmissible the conviction is to be quashed.

“A. T. LAWRENCE.”

Copy of the learned judge's note above referred to:—

“Gertrude Sandles Taylor: I am twenty-three years of age, and reside with my parents at 2, Northgate, Bridgnorth, Salop. I have known Dr. Bond two or three years. In January, 1905, I stayed with him about fourteen days. Something happened. He had connection with me. I said I thought I had better go. He said ‘Before you go I will operate on you.’ I had thought I was in trouble. I said ‘I think I am in family way.’ He said he

was a doctor and would put me all right. [Instruments produced : speculum, vulsellum, catheter, she picks out.] He put trumpet up my private parts. I said 'Oh !' He took vulsellum. He said 'Promise me you'll never tell any one.' I said 'No.' He put vulsellum up trumpet ; I felt it. He said it would fetch it away—the child. He was not long. He pulled them out. I said 'Am I all right ?' He said 'I'm afraid not ; if you are not write to me when you get home—don't go more than six weeks.' I wrote and told him. I got a letter from him. I did not go again. 28th September child born. He was father. Order : he pays 5s. a week. I had told him I was afraid I was like that. He said something like 'I daresay you are.' He said he had put dozens of girls right.

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"Cross-examined. January, 1905, I went to his house at night. I had had a child before. Nellie Cornes was his housekeeper. I was in service the night before I went. I left my place after a quarrel. He had connection the night I went there. I did not want to go to my sister's. I did not get on well with her. Nellie Cornes asked doctor if I might stay a day or two. Doctor said 'It could not have worked better.' Nellie Cornes said he had put her all right. I was unwell when I went to Dr. Bond's. I think it was about a fortnight after that he operated on me. The time for my courses had not come. Dr. Bond wrote several letters to me. He said if I was not all right he would use the instruments again. I was persuaded to burn the letters and I did so. I had notice to produce them before I destroyed them. Dr. Bond asked me not to give them to the police and I promised I would not. I went to see him at his house after the child was born. 28th September child born. Dr. Bond was in prison on Jones's case when I made the charge against him. He did use instruments on me. 5th December, 1905, I burned the two letters on the morning I came to court on affiliation summons. My mother saw solicitor for Dr. Bond. She told me after she had been. Dr. Bond had said he would see his solicitor. Mother went to police station to see Dr. Bond.

"Re-examined. These proceedings were taken by my wish. The police gave me notice to produce the letters. I burned the letters because I thought they were best out of the way.



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Dr. Bond asked me not to give them up and I promised I would not. He said it would be clear against him because it was in his own handwriting. He said he would give me 100*l.* and all his furniture if I would not give them. It was only a few days before the hearing. He said he would not have my case go into court. I wrote to him to say I had not been unwell. Affiliation order was by consent. I had a baby before. I knew I was likely to have another soon after connection. The first night I stayed with doctor the housekeeper did not know I was there. Mrs. Reeves is my sister. [Prisoner's book produced.] It is my address; it is my writing.

"Cross-examined. I don't remember when I wrote it; it was when staying with Dr. Bond."

The case was twice argued, the first time on April 28, before Lord Alverstone C.J., Kennedy, Ridley, Darling, and Walton JJ., and again on May 26, before Lord Alverstone C.J., Kennedy, Ridley, Darling, Jelf, Bray, and A. T. Lawrence JJ.

*B. Francis Williams, K.C. (Ellis Griffith with him), for the prisoner.* The evidence was inadmissible. The broad principle is that it is not allowable in order to prove that a man has been guilty of one crime to give evidence that he has been guilty of another: *Reg. v. Rearden*. (1) The only exceptions to this rule are where evidence of previous criminal acts has been admitted either to shew malice, to prove guilty knowledge, to negative accident, or to shew that the prisoner was acting on a system. None of those were set up here, and the evidence was really tendered merely as shewing that the prisoner was a bad man and therefore likely to commit the crime. That is not permissible. The prisoner was a medical man, though there was no evidence that he was in practice. It was admitted that the instruments might be quite properly used by a medical man for legitimate purposes, and the fact that he had performed an illegal operation on another woman nine months before can have no bearing on the question whether he used the particular instruments in the present case with a criminal intent.

(1) (1864) 4 F. & F. 76.

There was no system here. Only one other case is tendered in evidence, and that cannot create a system. Nor is there any nexus or connection between the cases of the two women. The case is not within the principle of any case in which similar evidence has been admitted : *Reg. v. Oddy* (1) ; *Reg. v. Ollis* (2) ; *Reg. v. Rhodes* (3) ; *Reg. v. Francis* (4) ; *Reg. v. Geering* (5) ; *Makin v. Attorney-General for New South Wales* (6) ; *Reg. v. Heesom* (7) ; *Reg. v. Dale* (8) ; *Reg. v. Holt* (9) ; *Reg. v. Winslow* (10) ; *Rex v. Wyatt*. (11)

*Abel Thomas, K.C. (R. V. Bankes with him)*, for the prosecution. The evidence was admissible. It is necessary to prove that the instruments were used for the purpose of procuring abortion, and the fact that the prisoner used the same instruments for that purpose on a similar occasion on another woman is cogent evidence of the design or intent with which he used them on the present occasion. The cases are summed up in Archbold's Criminal Pleading, 23rd ed. pp. 308, 309 ; Roscoe's Criminal Evidence, 12th ed. pp. 85, 86. " When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant." (12) The evidence of Gertrude Taylor shews that the prisoner admitted that he had done the act before for the purpose of getting girls out of trouble, and is therefore evidence of a system. It is impossible to prove system except by calling evidence of specific instances. [He also referred to *Rex v. Mogg* (13) ; *Reg. v. Dossett*. (14)]

*B. Francis Williams, K.C.*, replied.

*Cur. adv. vult.*

June 12. LORD ALVERSTONE C.J. read the following judgment:—  
In this case the defendant was indicted under s. 58 of 24 & 25 Vict.

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| (1) (1851) 5 Cox, C. C. 210 ; 2 Den. C. C. 264 ; 20 L. J. (M.C.) 198. | (8) (1889) 16 Cox, C. C. 703.                                  |
| (2) [1900] 2 Q. B. 758.   | (9) (1860) 8 Cox, C. C. 411.                                   |
| (3) [1899] 1 Q. B. 77.  | (10) (1860) 8 Cox, C. C. 397.                                  |
| (4) (1874) L. R. 2 C. C. R. 128.                                      | (11) [1904] 1 K. B. 188.                                       |
| (5) 18 L. J. (M.C.) 215.  | (12) Stephen's Digest of the Law of Evidence, 6th ed. art. 12. |
| (6) [1894] A. C. 57.  | (13) (1830) 4 C. & P. 364.                                     |
| (7) (1878) 14 Cox, C. C. 40.  | (14) (1846) 2 C. & K. 306.                                     |

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c. 100 for feloniously using instruments upon one Ethel Annie Jones on October 25, 1905, with intent thereby to procure miscarriage. It was not disputed that in fact the accused had used instruments, but it was suggested that they were used for a lawful purpose and with no criminal intent. At the trial the evidence of a girl named Gertrude Taylor was tendered and admitted. The evidence of this witness was to the effect that in January, 1905, she had been staying at the house of the accused; that he had connection with her; and that subsequently, when in consequence of such connection she became pregnant, she had informed the prisoner, and that he used instruments of the same character upon her with a view to procure miscarriage. My brother Lawrence, upon the authority of *Reg. v. Geering* (1), *Reg. v. Dale* (2), and other cases cited before him, admitted the evidence, and the question raised is whether it was rightly admitted. The general rule of law applicable in such cases can be clearly stated. It is that, apart from express statutory enactments, evidence tending to shew that the accused had been guilty of criminal acts other than those covered by the indictment cannot be given unless the acts sought to be proved are so connected with the offence charged as to form part of the evidence upon which it is proved: see *Reg. v. Rearden* (3); or are material to the question whether the acts alleged to constitute the crime were designed or accidental: see *Reg. v. Gray* (4); or to rebut a defence which would otherwise be open to the accused: see *Makin v. Attorney-General for New South Wales*. (5) As is pointed out in the last-mentioned case, the statement of these general principles is easy; in applying them it is often very difficult to draw the line and decide whether a particular piece of evidence is admissible or not. In this case it was not disputed that the prisoner had in fact used the instruments upon the girl Jones either, as he suggested, for a lawful purpose or, as it was alleged by the prosecution, for an unlawful purpose. Can it be said that the fact that he had used instruments for

(1) 18 L. J. (M.C.) 215.

(3) 4 F. & F. 76.

(2) 16 Cox, C. C. 703.

(4) (1866) 4 F. & F. 1102.

(5) [1894] A. C. 57.

an unlawful purpose upon another girl some nine months before has any bearing upon the purpose for which they were used on the occasion in question? It is easy to give illustrations of cases in which such evidence would clearly be admissible, as, for instance, if the prosecution alleged that the accused was carrying on the business of an abortionist, and had with that object, and with that object only, on several occasions used instruments or provided drugs for reward or remuneration to himself, or if the purpose for which the particular instruments could be used being doubtful, it was alleged that any injury caused by such use was accidental. In such cases it seems to me that evidence of the kind would be admissible, as was recently pointed out in this Court in the case of *Rex v. Wyatt* (1), following *Reg. v. Rhodes* (2) and *Reg. v. Ollis*. (3) I have grave doubt whether the circumstances of this case are sufficient to render the evidence admissible upon the principle recognized in those cases. Prima facie there was no necessary connection between the act charged in the present indictment and the act alleged in the evidence admitted. It might possibly be suggested that, inasmuch as it was proved or admitted that the accused had improper intercourse with the two girls Jones and Taylor, and that both of them as the result of such intercourse had become pregnant, the evidence tended to establish a system or course of conduct on the part of the prisoner in cases in which he had got girls into trouble. In my opinion, however, this ground is too dangerous and not sufficient to justify the admission of the evidence. I must not, however, be supposed to decide that there might not be cases in which the evidence would have been admissible on such grounds, but this does not appear to me to be one of them. Nor does it by any means follow that evidence will be inadmissible on the ground only that it goes to prove only one other criminal act and not one of a number. There may be other circumstances shewing the act sought to be proved to be part of a criminal practice or system of which the criminal offence charged in the indictment formed part. The mere fact that the evidence tendered pointed to only one act is not conclusive

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(1) [1904] 1 K. B. 188.

(2) [1899] 1 Q. B. 77.

(3) [1900] 2 Q. B. 758.



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against the admissibility. I would point out that in the case of *Reg. v. Geering* (1), *Reg. v. Gray* (2), and *Makin v. Attorney-General for New South Wales* (3) the evidence was clearly admissible in order to rebut the allegation of accident or mistake. In this case, assuming, as I have said, the grounds upon which the evidence might be admitted not to apply, the case appears to me to be very near to that of *Reg. v. Oddy* (4), in which, before the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 19, evidence of the possession by the prisoner of property other than that charged in the indictment stolen from other persons was held not admissible. It is necessary, however, that I should refer to the case of *Reg. v. Dale* (5), tried at the Central Criminal Court, when, upon an indictment under this section for using a quill to bring about miscarriage, counsel for the prosecution referred in his opening statement to evidence he intended to call to prove that the person charged had made use of a quill for a similar purpose on other occasions. Charles J. ruled that evidence of similar acts of the prisoner practised on different women, both prior and subsequent to the offence charged in the indictment, would be admissible. If that case is to be construed to authorize the admission of evidence of prior acts of a similar kind when the act is admitted and the only question is the purpose for which it was done, it goes too far. The report is very meagre, but on reference to the report in the 110th vol. Central Criminal Court Sessions Papers, I observe that the question was raised during Mr. Fulton's opening, and that at the conclusion of the opening the prisoner pleaded guilty, so that the point was never formally raised and argued. It may be that in that case the evidence was admissible upon some one or other of the grounds to which I have referred. My attention has been called by my brother Kennedy to the case of *Reg. v. Cooper*. (6) In my opinion the decision in that case may clearly be supported on the ground that the evidence tended to shew that the accused knew the consequences of his act. If it is supposed to lay down a wider principle and one which would cover this case, I do not

(1) 18 L. J. (M.C.) 215.

(2) 4 F. &amp; F. 1102.

(3) [1894] A. C. 57.

(4) 5 Cox, C. C. 210.

(5) 16 Cox, C. C. 703.

(6) (1849) 3 Cox, C. C. 547.

agree with it, and I may add that it does not appear to be cited as an authority upon the point argued before us in the recognized text-books. I think it right to add that, had I thought the evidence admissible, the fact that it would have tended to establish that the accused had been guilty of another crime would not have rendered it inadmissible: see *Makin v. Attorney-General for New South Wales* (1), *Reg. v. Rearden* (2), and other cases. For the above reasons I think the evidence was inadmissible, and that the conviction should be quashed, but as the majority of the Court are of a different opinion the conviction will stand.

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KENNEDY J. read the following judgment:—In this case John Bond was charged with attempting to procure abortion by using instruments on the body of Ethel Annie Jones on October 20, 1905. The question for the decision of the Court for Crown Cases Reserved is as to the admissibility of the evidence of another woman, Gertrude Sandles Taylor, who was called as a witness to depose that the accused nine months before had been guilty of the same crime upon her, and who in the course of her examination in chief stated that he had then used language to her indicating that previously he had been guilty of the same crime in many other cases.

In my judgment the question is one of great importance as affecting the fair trial of accused persons. It may be laid down as a general rule in criminal as in civil cases that the evidence must be confined to the point in issue: Roscoe's Digest of the Law of Evidence in Criminal Cases, 12th ed. (1898) pp. 78, 79. When a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment which alone he can be expected to come prepared to answer. It is therefore a general rule that the facts proved must be strictly relevant to the particular charge and have no reference to any conduct of the prisoner unconnected with such charge; therefore it is not allowable to shew on the trial of an indictment that the prisoner has a general disposition to commit the same kind of offence as that for which he stands indicted: Russell on

(1) [1894] A. C. 57.

(2) 4 F. & F. 76.

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Crimes, 6th ed. (1896) vol. 3, p. 403. Thus it was resolved by all the judges nearly one hundred years ago in *Rex v. Cole* (1) that in a prosecution for an infamous crime an admission by the prisoner that he had committed such an offence at another time and with another person, and that he had a tendency to such practices, ought not to be received in evidence. The law of England, said Lord Campbell C.J. in *Reg. v. Oddy* (2), does not allow one crime to be proved in order to raise a presumption that another crime has been committed by the perpetrator of the first, and the same law has twelve years ago been restated in a judgment of the Privy Council: "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried": *Makin v. Attorney-General for New South Wales*. (3) Then follows a passage on which reliance was placed by the counsel for the prosecution, but which I think it is not necessary here to quote. Nothing can so certainly be counted upon to make a prejudice against an accused upon his trial as the disclosure to the jury of other misconduct of a kind similar to that which is the subject of the indictment, and, indeed, when the crime alleged is one of a revolting character, such as the charge against Bond in the present case, and the hearer is a person who has not been trained to think judicially, the prejudice must sometimes be almost insurmountable. Therefore if, as is plain, we have to recognize the existence of certain circumstances in which justice cannot be attained at the trial without a disclosure of prior offences, the utmost vigilance at least should be maintained in restricting the number of such cases, and in seeing that the general rule of the criminal law of England, which (to the credit, in my opinion, of English justice) excludes evidence of prior offences, is not broken or frittered away by the creation of novel and anomalous exceptions. So sacred in our Courts has been

(1) Mich. T. 1810. Cited from M.S.,  
Russell on Crimes 6th ed. vol. 3,  
p. 403, note (n).

(2) 20 L. J. (M.C.) 198.

(3) [1894] A. C. 57, at p. 65.

the observance of this general rule that, on the trial of a prisoner who was indicted for stealing a shilling which had been marked and was found in his possession, evidence of the prisoner's own statement to the constable who arrested him as to his possession of other moneys of the prosecutor was ruled to be inadmissible because it related to another felony: *Reg. v. Butler*. (1) Equally significant, I think, has been the recognition of the general rule on the part of our Legislature. The provisions of the Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), forbid, except in special circumstances, any question as to other offences committed by the prisoner or as to his past bad character; a series of earlier statutes—including the Larceny Act, 1861, the Coinage Offences Act, 1861, and the Prevention of Crimes Act, 1871—secure that when an indictment contains a charge relating to a previous conviction as well as a charge of a subsequent offence the prisoner shall, in the first instance, be arraigned upon so much only of the indictment as charges the subsequent offence, and the jury, in the first instance, be charged only concerning the subsequent offence. When the Legislature by the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 19, provided that, on the trial of a person charged with having received goods knowing them to be stolen or having stolen property in his possession, evidence might be given of such person having in his possession other stolen property, and that such evidence might be taken into consideration for the purpose of proving that such person knew the property to be stolen which forms the subject of the proceedings against him, it qualified this provision by limiting the evidence to property stolen within a period of twelve months preceding the prosecution, and by the words “found in the prisoner's possession” made it requisite, in order to shew from such evidence a guilty knowledge in the prisoner, not merely to prove that other property stolen within the preceding period of twelve months had at some time previously been dealt with by the prisoner, but also to prove that such other property was found in the prisoner's possession at the time when he was found in possession of the property which is the subject of the indictment. The established limitations of the

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(1) (1846) 2 C. &amp; K. 221.



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general rule, and the "apparent exceptions" to it (1) at common law—to use the language of Archbold's Criminal Pleading Evidence and Practice, 23rd ed. p. 306—are, I venture to think, at the present time reasonably plain, and referable to definite and intelligible principles, although the discussion of the present case has amply shewn it is not easy to say whether a particular case falls within the rule or within the apparent exceptions.

The general rule cannot be applied where the facts which constitute distinct offences are at the same time part of the transaction which is the subject of the indictment. Evidence is necessarily admissible as to acts which are so closely and inextricably mixed up with the history of the guilty act itself as to form part of one chain of relevant circumstances, and so could not be excluded in the presentment of the case before the jury without the evidence being thereby rendered unintelligible. So in *Rex v. Wylie* (2), Lord Ellenborough, after mentioning a case where a man committed three burglaries in one night and stole a shirt at one place and left it at another, and they were all so connected that the Court heard the history of all the three burglaries, remarked that "if several and distinct offences do so intermix and blend themselves with each other, the detail of the party's whole conduct must be pursued." (3) Instances are cited in Russell on Crimes, 6th ed. vol. 3, pp. 405-11; Archbold's Criminal Pleading, 23rd ed. pp. 307, 308. *Reg. v. Firth* (4) is a recent example of this class; *Reg. v. Rearden* (5) illustrates the limitation upon the general rule in the case of rape. Willes J., who presided at the trial in *Reg. v. Rearden* (5), cited in support of his ruling a case on the Western Circuit—a case of larceny of grain from a barn—in which he had admitted evidence of the owner of the barn that he had watched and detected several stealings by the same person. Such prior acts formed, in point of historical and circumstantial connection, inseparable parts of the transaction which the jury had to investigate. Within this same limitation, I think, come the cases of trials for murder and

(1) See *Reg. v. Carter*, (1884) 12 nom. *Rex v. Whiley*, 2 Leach, 983, Q. B. D. 522. at p. 985.

(2) (1804) 1 B. & P. (N. R.) 92.

(4) (1869) L. R. 1 C. C. R. 172.

(3) From report of the case sub

(5) 4 F. & F. 76.

wounding with felonious intent, in which evidence is admissible to shew prior assaults by the prisoner upon the murdered or injured person or menaces uttered to him by the prisoner, or to shew conversely irritating behaviour by the deceased to the prisoner, as in *Reg. v. Hagan*. (1) The relations of the murdered or injured man to his assailant, so far as they may reasonably be treated as explanatory of the conduct of the accused as charged in the indictment, are properly admitted to proof as integral parts of the history of the alleged crime for which the accused is on his trial.

In my view, if we pass from the consideration of the necessary limitations which I have just illustrated, we shall find that the cases to which Archbold refers as apparent exceptions at common law to the general rule are almost all cases in which evidence of transactions other than that which forms the subject of the indictment has been admitted as relevant to the issue as negating the defence of accident or mistake in cases in which accident or mistake, if proved, would constitute a complete defence to the accusation. This is, I think, the principle upon which, in the group of reported murder cases of which *Reg. v. Geering* (2), *Reg. v. Cotton* (3), *Reg. v. Roden* (4), and *Makin v. Attorney-General for New South Wales* (5) are familiar examples, evidence has been held admissible to prove the happening of like fatalities to persons other than the person with whose murder the prisoner is charged under circumstances in which these other fatalities may reasonably be connected with action on the part of the prisoner. *Reg. v. Geering* (2) may be taken as a type. On an indictment against a prisoner for the murder of her husband by arsenic in September, 1848, evidence was tendered by the prosecution of arsenic having been taken by the prisoner's two sons, one of whom died in December and the other in March subsequently, and also by a third son who took arsenic in April following but did not die. Proof was given of a similarity of symptoms in the four cases. Evidence was also tendered that the prisoner lived in the

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(1) (1873) 12 Cox, C. C. 357.

(3) (1873) 12 Cox, C. C. 400.

(2) 18 L. J. (M.C.) 215.

(4) (1874) 12 Cox, C. C. 630.

(5) [1894] A. C. 57.

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same house with her husband and sons, that she prepared their tea, cooked their victuals, and distributed them to the four parties. Held, that this evidence was admissible for the purpose of proving—first, that the deceased husband actually died of arsenic; secondly, that his death was not accidental; and that it was not inadmissible by reason of its tendency to prove or create a suspicion of a subsequent felony. In *Makin v. Attorney-General for New South Wales* (1) the judgment of the Privy Council expressly approved the ruling in *Reg. v. Geering* (2), after a review of the cases; Lord Herschell L.C. (who delivered judgment) remarking that it could not be denied that the decisions had not been completely in accord, and disapproving of the contrary ruling in *Reg. v. Winslow*. (3) It is really upon the same grounds that in a large number of cases, other than cases of murder, evidence of other prior acts of the prisoner, possibly themselves constituting crimes of the same nature as the charge upon which the prisoner is on his trial, has been admitted, although these prior acts do not historically form part of the circumstances of that charge. Here again the evidence has been admitted as negating accident or mistake in regard to the occurrence which is the subject of the indictment. In all these cases it will, I think, be found that the occurrences of which evidence was admitted were occurrences connected with conduct on the part of the accused, so repeated and so closely linked in point of time as well as character with the offence for which the prisoner was on his trial, that according to the test of justice as well as of common sense, there could be no serious challenge of its relevancy to the issue as to accident or mistake on the part of the accused in the particular case which formed the subject of the indictment. “When there is a question whether an act was accidental or intentional, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is deemed to be relevant”: Stephen’s Digest of the Law of Evidence, 6th ed. art. 12. The principle was clearly stated by Lord Russell of Killowen C.J. when delivering the judgment of this Court in *Reg. v. Rhodes*. (4) He quotes with approval the judgment of

(1) [1894] A. C. 57.

(2) 18 L. J. (M.C.) 215.

(3) 8 Cox, 397.

(4) [1899] 1 Q. B. 77, at p. 82.

Lord Coleridge C.J. in *Reg. v. Francis*. (1) The evidence "tends to shew that he was pursuing a course of similar acts, and thereby it raises a presumption that he was not acting under a mistake. It is not conclusive, for a man may be many times under a similar mistake, or may be many times the dupe of another; but it is less likely he should be so often, than once, and every circumstance which shews he was not under a mistake on any one of these occasions strengthens the presumption that he was not on the last, and this is amply borne out by authority." (2) So in a later case cited in argument in the present case—*Reg. v. Ollis* (3)—Wright J. expounded the principle in similar terms, dwelling upon the importance of the element of nearness in point of time and circumstance in determining the relevancy, and, therefore, the admissibility, of the evidence as to the acts of the accused. "The evidence," said the learned judge (4), "tended to shew that the conduct of the prisoner, in tendering drafts on a bank at which he had no living account, was not inadvertent or accidental, but was part of a systematic fraud, extending over a period immediately preceding and following the date of the offence charged; and the case in this respect seems to me to be governed by *Reg. v. Francis* (1) and *Reg. v. Rhodes*. (5)" Bruce J., one of the dissenting judges in the same case of *Reg. v. Ollis* (3), lays down the law to the like effect with even greater strictness. (6) "A line of cases has established the rule that when it becomes material to establish that an act charged in the indictment, and proved to have been done, was intentional and not accidental, evidence is admissible of similar acts done by the same person, having no bearing upon, or connection with, the acts charged in the indictment, save that the acts are similar and done by the same person. This rule is sometimes stated, I think inaccurately, to be a rule which admits indirect evidence of this class to prove guilty knowledge. The evidence is, I believe, admissible under the rule I have mentioned only on the ground that it tends to negative mistake or accident. It is quite true that in many cases to negative mistake or accident is to leave no

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(1) L. R. 2 C. C. R. 128.

(2) L. R. 2 C. C. R. at p. 132.

(3) [1900] 2 Q. B. 758.

(4) [1900] 2 Q. B. 758, at p. 768.

(5) [1899] 1 Q. B. 77.

(6) [1900] 2 Q. B. 758, at p. 774.



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other alternative, but that the act was intentionally done with a criminal intent. But the ground on which this indirect evidence is admissible is that it tends to negative mistake or accident."

It is in strict accordance with the principles enunciated by the authorities that evidence of conduct of the prisoner on other occasions was admitted in cases of arson: *Reg. v. Gray* (1); of embezzlement: *Reg. v. Richardson* (2); of false pretences: *Reg. v. Francis* (3) and *Reg. v. Rhodes* (4); of coining: *Rex v. Fuller* (5) and *Reg. v. Weeks* (6); of forgery: *Rex v. Whitley* (7) and *Reg. v. Colclough* (8); of obtaining credit by fraud: *Rex v. Wyatt*. (9)

In all these cases it was necessary to negative accident or mistake; in all of them the multiplication of similar acts having some connection in time and circumstance and nature to the act which was the subject-matter of the trial was admitted to proof as evidence shewing systematic conduct of the prisoner at the time of the offence charged against him, and, therefore, negating accident or mistake on his part in the last case. But it must, I think, be admitted that apart from judicial dicta (which, although deserving of respect, cannot be treated with the weight which attaches to a decision) there is authority which, speaking for myself, I am not prepared to overrule, that when the question of criminal intent is material, then although in strictness the case is not one of disproving merely accident or mistake, evidence of prior occurrences may become admissible against the prisoner. I say this with special regard to the authority of *Reg. v. Cooper* (10), a case which has never been dissented from and in which the point was fully argued before Cresswell J. It was not cited to us in argument, and therefore I think it well to state the salient facts and the reasoning of the eminent judge who presided at the trial, which renders the case peculiarly relevant to the matter now before us, because he takes the case of a charge of abortion as an illustration of the admissibility of a number of similar acts to negative innocence of intent.

(1) 4 F. &amp; F. 1102.

(2) (1860) 2 F. &amp; F. 343.

(3) L. R. 2 C. C. R. 128.

(4) [1899] 1 Q. B. 77.

(5) (1816) R. &amp; R. 308.

(6) (1861) 30 L. J. (M.C.) 141.

(7) 2 Leach, 983.

(8) (1882) 15 Cox, C. C. 92.

(9) [1904] 1 K. B. 188.

(10) 3 Cox, C. C. 547.

The prisoner was charged with accusing a person of an unnatural crime with intent to extort money, and in the course of the trial an argument arose as to the admissibility of a question whether one of the witnesses had seen the prisoner, who was a soldier, come off guard on former occasions with money in his possession, and as to what he had said as to the means by which he had obtained that money, and Cresswell J. said (1): "The evidence is not offered by way of proving simply that the prisoner had been guilty of the same crime before. The question is, whether on this occasion he did an act with the design of effecting a certain object. One step in the proof is to shew that he would be likely to know that a certain result would follow. . . . Suppose a charge against a man that he had attempted to procure abortion: the same medicine might be administered with that intention or without it. If it could be proved that he had often given that medicine before, and that he knew that abortion had always followed, surely that would be evidence against him."

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In my opinion it does not follow that to prove a criminal intent it is competent to the prosecution to prove the occurrence of a single prior act of the like criminal nature. The admissibility, not merely the weight, of the evidence depends, in my view, upon the evidence which it is proposed to adduce being evidence of such conduct as would authorize a reasonable inference of a systematic pursuit of the same criminal object.

In the present case, as it appears to me, there is not in strictness a question of accident or mistake. It was not disputed that the accused, a qualified surgeon, as I understand the facts, but not at the time in active practice, had used the surgical instruments upon Ethel Annie Jones. Did he use them for a lawful or for an unlawful purpose? That was the sole issue. In other words, had he or had he not in using them the mens rea? In my opinion, if the evidence here had consisted solely of the single act alleged by the witness Gertrude Taylor to have been done to her nine months before, it ought not to have been admitted. Such a single isolated act is not just ground for any inference, and an act from which no inference can justly be drawn ought

(1) 3 Cox, C. C. 547, at pp. 549, 550.

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not to be allowed to be before the jury. If such evidence were admissible, then in all cases involving the issue of mens rea (and most serious crimes do involve it), as it seems to me, it would be permissible to shew that on any previous occasion within any measurable distance of time the prisoner had been guilty of an act of similar misconduct, and in effect we should be doing that which would be unfair to the accused, and which Lord Campbell condemned as proving one crime in order to raise a presumption that another crime had been committed by the perpetrator of the first. Peculiarly dangerous and indeed unfair to the accused would the admission of evidence of such a single act be in the present case. The only evidence which directly implicated the accused was the evidence of a woman who was herself party to the alleged crime, and who was morally, if not in the strict legal sense, an accomplice of the accused person. She was an adult person who knew, according to her account, for what purpose the operation was to be performed, and consented to its performance. The further evidence which was admitted, and in regard to which the question for this Court has arisen, was the evidence so far as it related to her own treatment of a witness who, if her evidence was true, also was a consenting party to the illegal operation which the prisoner performed upon her, and to this extent an accomplice in his criminal conduct. It is needless to dwell upon the danger to innocence of evidence of this description. But the evidence given by Taylor was not confined to evidence of this single act. It included a statement by the prisoner to Taylor which might fairly be interpreted to mean that he had successfully performed a similar operation upon dozens of girls; in other words, that he had often used the same instruments before and had always found that abortion followed. Upon the reasoning of Cresswell J. in *Reg. v. Cooper* (1) (see especially p. 550), and upon the authority of that judgment, it appears to me that such evidence of the admission by the prisoner of a course of conduct cannot be excluded, and that the ruling of Charles J. in *Reg. v. Dale* (2), in which it was proposed to prove repeated acts of the same nature over a period including the period of the crime, as well as the ruling of my brother Lawrence in this case, may be upheld.

(1) 3 Cox, C. C. 547, at pp. 549, 550.

(2) 16 Cox, C. C. 703.

Therefore with regret, and, I need hardly say, with sincere diffidence, I am unable to concur in the judgment just pronounced by the Lord Chief Justice.

RIDLEY J. I have had the opportunity of reading the judgment which has been delivered by my Lord, and, as I thoroughly agree with both its reasoning and its result, I think it is unnecessary to give a judgment of my own.

DARLING J. read the following judgment:—The defendant was indicted for on October 20, 1905, feloniously using certain instruments upon one Ethel Jones with intent thereby to procure her miscarriage. It is unquestioned that the defendant had in fact used instruments upon Ethel Jones, and for the defence it was suggested that he did so in operating for a lawful purpose. The defendant is qualified as a surgeon, but there was no evidence that he practised as such. Ethel Jones was his servant, and alleged that she was pregnant by him. The prosecutor tendered, and the judge admitted, the evidence of Gertrude Taylor. The question for us is whether that evidence was admissible in law. Her testimony was to the effect that in January 1905, she stayed for fourteen days with the defendant, that she became pregnant by him, that he operated upon her with instruments like those he used on Ethel Jones, and that he told her the operation "would fetch away the child." The direct effect of Taylor's evidence is to prove that the defendant had been guilty of another crime than that charged in the indictment but similar in character. Now it is not to be rejected on that ground. I have tried to ascertain the principle which must be relied upon as justifying its acceptance or rejection, and I find it in Foster's Crown Law, Discourse I., p. 246, where it is said: "The rule of rejecting all manner of evidence in criminal prosecutions that is foreign to the point in issue is founded on sound sense and common justice. For no man is bound at the peril of life or liberty, fortune or reputation, to answer at once and unprepared for every action of his life." The same rule is thus expressed by Lord Campbell in *Oddy's Case* (1): "The law of England does not allow one crime to be proved in order raise a probability that another crime has

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(1) 20 L. J. (M.C.) 198, at p. 200.



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been committed by the perpetrator of the first." That he was speaking of a crime evidence as to which would have been altogether "foreign to the point in issue"—to use Foster's phrase—appears, I think, by this observation of his Lordship made in the course of counsel's argument: "In the French courts the case against an accused person is often commenced by evidence that he had previously committed offences of the same sort as that which forms the subject of inquiry. But it is not the practice of our law." Now the reason for the practice in the French courts of admitting evidence of many matters which we should certainly describe as "foreign to the point in issue" is that the Code d'Instruction Criminelle (Liv. 2, Tit. 2 § 241) provides: "L'acte d'accusation exposera 1° la nature du délit qui forme la base de l'accusation: 2° le fait et toutes les circonstances qui peuvent aggraver ou diminuer la peine." By this means various matters are in France laid before the jury which have no connection with the crime charged, but are such as, in England, are brought to the knowledge of the judge alone (perhaps by means of the calendar) or are proved after verdict. The jury in France then find the fact with extenuating or aggravating circumstances for the purpose of affecting the sentence, which is heavier on an habitual evil liver.

I should greatly regret a close assimilation of our criminal procedure to that of France, but I think it well to note that the French rules as to evidence necessarily differ from ours by reason of the wide difference between the functions of judges and juries under French and English law. Indeed, it can hardly be said that in our sense the French courts are bound by rules of evidence at all. Yet, subject to observance of the rule as laid down by Foster, our law does undoubtedly allow evidence of another crime in order to negative some possible defence, such as accident or mistake, or to shew a systematic course of conduct or guilty knowledge, where that is material. For each of these propositions there is ample authority in *Reg. v. Geering* (1), in *Reg. v. Rhodes* (2), in *Reg. v. Weeks* (3), in *Reg. v. Francis* (4), and in *Rex v. Wyatt*. (5)

(1) 18 L. J. M. C. 215.

(3) (1861) L. &amp; C. 18.

(2) [1899] 1 Q. B. 77.

(4) L. R. 2 C. C. R. 128.

(5) [1904] 1 K. B. 188.

Still, it has been argued that such evidence may not be admitted to prove intent. It cannot be said that no evidence is admissible to prove intent, for declarations of a defendant's intention and unequivocal acts of his are every day given in evidence with that object. Moreover, accident is negatived merely in order to prove design which involves intent. System is proved for the same reason, and proof of scienter is merely a step towards that end. I do not quote a number of cases which have been decided on this point, because very many of them were reviewed in the case of *Makin v. Attorney-General for New South Wales* (1); and the Lord Chancellor there said (2): "It cannot be denied that the decisions have not always been completely in accord." In the same case, however, he thus laid down the law in delivering the judgment of the Privy Council (2): "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental or to rebut a defence which would otherwise be open to the accused." I do not suppose that Lord Herschell meant that such evidence might be called to rebut any defence possibly open, but of an intention to rely on which there was no probability whatever. Here, however, the evidence objected to was called to overthrow a defence already set up and admitted to be the defendant's answer to the charge. It appears that the defence adopted by the defendant in this case was that he was performing a lawful operation in using instruments adapted to procure abortion. Where ignorance is the defence relied on, the cases I have cited shew that evidence is admissible to prove knowledge—where accident is suggested as a defence, evidence is equally

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(1) [1894] A. C. 57.

(2) *Ibid.* at p. 65.

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admissible to disprove that by shewing design—and it follows that such evidence may go to prove further what particular design actuated the perpetrator of the act. Such evidence assuredly cannot be inadmissible merely because it is more cogent in so far as it shews not only the existence of some design, but also precisely what that design was. Here the defence suggested was that the act charged was done designedly, but that the design was lawful, and the reason of its being so is indicated. Then this evidence is tendered by the prosecution to the effect that, on another woman pregnant by him, the defendant had performed a similar act or operation with like instruments, and had then stated in effect that his design on that occasion was unlawful, viz., to procure abortion. In my opinion this evidence of Taylor is not irrelevant or foreign to the point in issue—that issue being, not what did he do? but with what object did he do it? That issue involves the state of his knowledge or belief as to the effect of such an operation. Taylor's evidence went to prove that, contrary to the defendant's allegation in defence as to his being engaged in doing a lawful act, he was doing a thing which, in his view, was apt to procure abortion, and that because it was so he had already done it with that unlawful avowed knowledge and purpose. This evidence, therefore, tends to prove that the defendant had in repeating his former conduct an intention different from that alleged by him in his defence, so it is not foreign to the point of it nor less relevant because it goes to prove the charge in the indictment. I have not affected to judge whether the case of *Reg. v. Dale* (1) was rightly decided; for I do not think it necessary to rely upon that decision of Charles J. in order to uphold this conviction. But even were that ruling wrong, I think this conviction can still be sustained. Nor does it appear to me advisable to strive for increase in the technicality of our rules of evidence so as to narrow yet more the approaches to the source of justice. Our law already, and for good reason, undoubtedly excludes evidence of many matters which anyone in his own daily affairs of moment would regard as important in coming to a decision. The observations of Lord Campbell shew that much would be excluded at a trial merely

because the defendant would, in the then state of the law, have found it hard to bring evidence in contradiction. Now when the application of this doctrine is contended for, it seems to me important to bear in mind that a defendant on a criminal charge might not in Lord Campbell's day give evidence, nor could his wife. These disabilities no longer exist, and, provided he have due notice, an accused person may fairly be confronted with evidence relevant to the issue now that he may give his own testimony, although it would have been hard to admit it when the witness-box was forbidden to him. I believe that to quash this conviction would necessitate the interpretation of our rules of evidence so in favour of the accused as to exclude such proof of guilty knowledge as hitherto has been admissible, and might perhaps give occasion for the repetition of the bitter saying, "Il s'en faut bien que l'innocence trouve autant de protection que le crime." (1)

Since writing my judgment I have had the advantage of reading that of my brother Bray, and I agree that the conviction can also be sustained for the reasons he gives to that effect.

The following judgment (written by JELF J.) was read by BRAY J.:—I am of opinion that the evidence was admissible and that the conviction ought to stand. It is no doubt contrary to the law of this country (as it is repugnant to the British sense of justice) to admit against a prisoner who is on his trial for one offence evidence that he has on another occasion committed another, or even a similar offence, merely with the object of shewing that he is on that account a person more likely to have committed the offence with which he is charged, except (and the exception is significant) that, if a prisoner endeavour to establish a good character as making it improbable that he should have committed the crime charged against him, the prosecution may rebut this inference by proving even a previous conviction: see as to this exception the cases collected in Archbold's Criminal Pleading, 23rd ed. p. 313. But it often happens, both in civil and criminal cases, that evidence is tendered on several alternative grounds, and yet it is never objected that if on any ground it is

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(1) La Rochefoucauld: *Maximes et Réflexions Morales*, 465.



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admissible, that ground must not prevail, because on some other ground it would be inadmissible and prejudicial. In such cases it is usual for the judge (not always very successfully) to caution the jury against being biased by treating the evidence in the objectionable sense. Now in regard to the class of evidence with which we have to deal, I think we all agree that the touchstone by which the evidence in question in the present case is to be deemed admissible or not is most carefully defined in the judgment of Lord Herschell in *Makin v. Attorney-General for New South Wales* (1), expressly approved and adopted ten years later by the Court for the Consideration of Crown Cases Reserved in *Rex v. Wyatt*. (2) Those cases crystallize the doctrine laid down in the long series of decisions which have been cited to us, namely, that (apart from legislative enactments which deal with certain special cases) the common law test of admissibility is that "the evidence adduced is relevant to an issue before the jury," it being added that "it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would be otherwise open to the accused." The judgment in *Rex v. Wyatt* applies to that case the description of evidence spoken of by Lord Herschell in these words (3): "The evidence objected to was clearly admissible as tending to establish a systematic course of conduct on the part of the accused, and as negating any accident or mistake or the existence of any reasonable or honest motive." These last words are equivalent to and confirm Lord Herschell's expression "to rebut a defence which would be otherwise open to the accused." Now in the present case the use of the instruments upon Ethel Jones was admitted, but it was suggested on the prisoner's behalf that the use was for a lawful purpose, and not with any criminal design. In effect the prisoner set up the defence, "In using the instruments I had no design to procure a miscarriage; if the thing which I did procured or tended to procure a miscarriage" (a fact which I do not understand to have been denied) "that came about accidentally, and not

(1) [1894] A. C. 57.

(2) [1904] 1 K. B. 188.

(3) *Ibid.* at p. 193.

designedly." This surely was "a defence open to the accused" which the prosecution might rebut—a defence, at all events, clearly ejusdem generis with the particular defences mentioned by Lord Herschell. It asserted "the existence of a reasonable or honest motive" which the prosecution might "negative." And upon the question whether there was or was not a design on the prisoner's part to procure the miscarriage of Ethel Jones evidence that on any other occasion he had done the same thing with similar instruments under similar circumstances with that design upon another girl seems to me to have a distinct bearing. The fact that only one other case was brought forward, and that case nine months old, goes, in my mind only to the weight, and not to the admissibility, of the evidence. The subject of inquiry is the state of mind of the prisoner when he used the instruments upon Ethel Jones, and the improbability that on one occasion under precisely similar circumstances he should have the design to procure a miscarriage, and on the other occasion should have another and an innocent object, would tend to shew (and that is all that is necessary) that he had the bad design in regard to Ethel Jones. Of course, if instances are multiplied, the weight of the evidence is greatly increased, and if a system is shewn it may be irresistible. But to my mind it is quite unnecessary to shew a system which is only a question of degree. If it were necessary to go beyond the two instances, this can generally only be done by proving a series of instances, and if the opposite view prevails it would be impossible to prove such series, as the first instance (besides the one charged) would be shut out in limine, or else the Court would have to decide according to the statement of counsel as to what he expected to be able to prove, and after it had admitted evidence of the first instance the rest might break down. In short, I cannot think that the admissibility of the evidence can depend upon the accuracy or astuteness of counsel's opening statement. If he tenders the evidence mainly on the right ground the ultimate bearing of it must depend upon what it turns out to be. For instance, if it wholly fails to come up to the proof suggested, it ought to be expunged, and in some cases, owing to the prejudice created by its inadvertent admission, the jury might have to be discharged and the case tried before a

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fresh jury. If the proof of the evidence afterwards given by Gertrude Taylor had been handed up to the judge he would, I think, have been bound to admit it. And this leads me to this final point, on which, if necessary, this case might be rested. While to my mind it is not necessary to prove a system, yet the evidence of Gertrude Taylor does abundantly prove a system on the part of the prisoner to procure miscarriage on girls in the way described. For when she said she was in the family way he said he would "put her all right," and proceeded to use these instruments, saying also on the same subject that "he had put dozens of girls right." If this does not establish against the prisoner out of his own mouth that he was systematically guilty of the crime which he was charged with committing against Ethel Jones, I fail to see what evidence would suffice. For all these reasons I think the evidence was quite rightly admitted by my brother A. T. Lawrence, and that the conviction should be affirmed.

BRAY, J. I will now read my own judgment. It is unnecessary for me to recapitulate the facts, as they have been already fully stated, and I come at once to the question whether the evidence of Gertrude Taylor was admissible. A careful examination of the cases where evidence of this kind has been admitted shews that they may be grouped under three heads: 1. Where the prosecution seeks to prove a system or course of conduct. 2. Where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake. 3. Where the prosecution seeks to prove knowledge by the prisoner of some fact.

The case of *Blake v. Albion Life Assurance Society* (1)—a civil case—will illustrate the first class. Lord Lindley says (2): "Nothing could seem, at first sight, more plain and straightforward, and there would be no appearance of fraud; but then the plaintiff proposed to adduce evidence to shew that the transaction was one of a fraudulent class. Was he, or was he not, to be precluded from doing it? I think that he was quite at liberty to put his case in that way, and could only do so by going into a great number of other transactions having some features

(1) (1878) 4 C. P. D. 94.

(2) Ibid. at p. 106.

in common with this. I agree that in order to prove that A has committed a fraud on B., it is neither sufficient nor even relevant to prove that A. committed fraud upon C., D., and E. Stopping there, I admit that proposition. . . . The answer to the objection that evidence of frauds on other persons cannot be admitted, is that this transaction is one of a class, that there are features in common, the features in common being the false pretence and a knowledge of that false pretence on the part of the defendant company, and the moment that is shewn the plaintiff's case is established." The word "system" implies a connection between the acts of which evidence is sought to be given and the act with which the prisoner is charged. A number of acts of theft do not as a rule constitute a system. They are isolated acts having no connection with one another. On the other hand, the transactions of a long firm are the result of a formulated scheme and part of a system. The ground on which in cases of this class evidence is admitted of acts not charged in the indictment is, in my opinion, that the case which the prosecution seeks to prove is that the prisoner has in his mind a scheme or plan (say) for obtaining money by fraud, that the act with which the prisoner is charged is part of a planned fraud, and that the other acts of which evidence is sought to be given when proved will shew the existence of the plan, and, therefore, the guilty mind of the prisoner. Other cases of this class are *Reg. v. Rhodes* (1) and *Reg. v. Ollis* (2) (where see the judgment of Wright J. at p. 768). *Reg. v. Oddy* (3), on the other hand, shews that where there was no system and no connection between the acts the evidence is inadmissible: see also *Reg. v. Holt*. (4)

Of the second class *Reg. v. Geering* (5) is a good example. In order to shew that the prisoner administered the poison for the purpose of killing her husband the prosecution required to negative accident or mistake. For this purpose evidence was admitted of the death of two of the prisoner's sons from the same poison about the same time and while they were living with the prisoner and had eaten food prepared by her. The principle on which

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(1) [1899] 1 Q. B. 77.

(3) 5 Cox, C. C. 210.

(2) [1900] 2 Q. B. 758.

(4) (1860) 1 Bell, C. C. 280.

(5) 18 L. J. (M.C.) 215.



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this evidence was admitted is not expressly stated further than by saying that it was admissible to disprove accident or mistake, but it obviously is this : If there had been but the one case charged in the indictment it was possible, though not probable, that the arsenic might have got into the food by accident or mistake, but when two other cases are proved where death happened on previous occasions to two other inmates under similar circumstances, accident or mistake becomes so improbable as to be almost impossible. The proof of each additional case increases the improbability of accident or mistake, and therefore tends to disprove it. It was necessary, of course, to shew that the other deaths happened under similar circumstances, but it was not necessary to prove a system, or that the prisoner had conceived a plan to poison all her family. One other death under similar circumstances would tend to shew the improbability of accident or mistake, and would on that ground be admissible. There are several other cases decided on the same principle, such as *Makin v. Attorney-General for New South Wales* (1), *Reg. v. Dossett* (2), and *Reg. v. Gray*. (3)

*Reg. v. Francis* (4) and the cases of uttering counterfeit coin will come under the third class, and to some extent also fall within the other two classes. It was necessary for the prosecution to shew that the prisoner knew that the articles of jewellery which he was pawning, or endeavouring to pawn, were false, and that the coin he was uttering was counterfeit; and one other act beyond the acts charged in the indictment might tend to prove knowledge, and would therefore be admissible.

It remains to be considered whether the evidence of Gertrude Taylor comes within any of these three classes. I will take the third class first. The prosecution no doubt had to prove that the prisoner knew that these instruments which he used were capable of being used for the purpose of procuring abortion, and the evidence of Gertrude Taylor went to prove such knowledge on the part of the prisoner; but the case does not shew that the knowledge of the prisoner was here really in dispute, and if the prosecution had claimed at the

(1) [1894] A. C. 57.

(2) 2 C. &amp; K. 306.

(3) 4 F. &amp; F. 1102.

(4) L. R. 2 C. C. R. 128.

trial that the evidence should be admitted on this ground, I think the prisoner's counsel would have stated that it was no part of his defence that the prisoner did not know, and that his case was that the prisoner was a doctor, and therefore, of course, knew that such instruments might be used to procure abortion as well as for lawful and proper purposes, and that the whole question was whether they were in fact used for an unlawful purpose. In that event I think the evidence would not have been admissible. The prosecution could not under such circumstances as those say that the evidence was required to prove knowledge; it would be obvious that it was wanted for some other purpose. I think, bearing in mind the strong prejudice that would necessarily be created in the minds of the jury by evidence of this class, which shews that the prisoner has been guilty on another occasion of a similar offence, the greatest care ought to be taken to reject such evidence, unless it is plainly necessary to prove something which is really in issue. It is true that in *Makin v. Attorney-General for New South Wales*(1) Lord Herschell (2) says "or to rebut a defence which would otherwise be open to the accused"; but I do not think his mind was directed to such a case as I have assumed, and indeed it could hardly be said that such a defence would be open after such a statement from the prisoner's counsel. In my opinion, if the prosecution sought to justify the admission of the evidence of Gertrude Taylor solely on this ground, we ought to hold that it was not admissible. I come now to the second class. In my opinion it cannot be said that this evidence went to negative accident or mistake in the case charged in the indictment. The prisoner's case was that he used these instruments for a lawful purpose and not by accident or mistake. It was said, however, that, according to the prisoner's case, miscarriage followed accidentally the use of these instruments, and that is true; but in Taylor's case miscarriage did not follow the use of these instruments, and her evidence did not tend to shew that such instruments might not have been lawfully used. It merely shewed that in her case they were used with an unlawful intention, but without any result. I see nothing

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(1) [1894] A. C. 57.

(2) [1894] A. C. 57, at p. 65.

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inconsistent in a doctor one day using these instruments for an unlawful purpose and in another case many months afterwards using them for a lawful purpose, unless you can shew a course of conduct, and not merely one or two isolated cases. It follows, from what I have stated, that if the evidence of Taylor was admissible it must be because it falls under the first class. It is here that, in my opinion, the principal difficulty arises. I have no doubt that, according to the principles laid down in cases of this class, it would be permissible to call evidence to shew that the prisoner carried on the business of an abortionist, but I think it would also be permissible to shew something perhaps a little short of this, viz., that he was in the habit of treating women in a state of pregnancy with a view to procure abortion. I think this would be a system or course of conduct within the cases. But I do not think that the proof of but one similar case, without any special connection with the case charged in the indictment, would prove, or indeed would be evidence of, such a system. Of course it may be said that if two cases will not do, how many will? But this is a difficulty which always arises in such cases. To prove that a man was twice drunk and nothing more will not prove that he is an habitual drunkard. I think, when evidence of this class is tendered, the judge should require an assurance from the counsel for the prosecution that in his opinion he has evidence of a sufficient number of cases to prove a system. In criminal trials no real difficulty can arise, because the judge has before him the depositions of the witnesses called before the magistrates and the proofs of any additional witnesses proposed to be called. He can therefore see for himself whether the evidence is sufficient; and, in my opinion, before admitting evidence of this kind the judge should satisfy himself that the evidence tendered will, if true, establish, or tend to establish, what I have called a system. If, therefore, all that Taylor proved was that the prisoner had attempted to procure abortion in her case, such evidence should not, in my opinion, have been admitted. In my opinion, however, Taylor's evidence, when looked at, went, if true, to prove much more. Mr. Thomas called our attention to her

statement that the prisoner had told her "that he had put dozens of girls right," and to other statements that she said he had made, viz., "that he was a doctor and would put me all right," and "that it"—referring to the instrument—"would fetch it away." In my opinion Taylor's evidence, when looked at as a whole, is evidence of a system on the part of the prisoner. It may be said that such evidence as this from a girl of bad reputation may be untrue and nearly worthless, and so it may be in some cases, though not here, but it is evidence which must be weighed by the jury. When once it is seen that a part of her evidence tends to shew a system, the whole evidence, in my opinion, becomes admissible. When evidence has been given of a system it becomes permissible then to prove any case which forms part of the system, and the operation which the prisoner attempted on her tended to corroborate the evidence she gave as to the statements he made to her. In my opinion, therefore, the whole of Taylor's evidence was admissible. But it is said that it was not tendered on this particular ground, and Mr. Thomas very fairly admitted that he did not expressly put forward this argument. In my opinion this admission of Mr. Thomas forms no good ground for quashing the conviction if we can see that no ground for its rejection could have been successfully put forward by the counsel for the prisoner. The case states, and rightly states, that if the evidence was admissible the conviction is to stand. Further, it does not state, and in my opinion also rightly, any particular ground as the ground on which the evidence was either tendered or admitted, except that it was to shew intent. The standing or quashing of the conviction ought not in my opinion to depend on whether the counsel for the prosecution put forward the right or the wrong ground. If there was a right ground, as in my opinion there was, on which this evidence could be admitted, no injustice has been done to the prisoner by admitting it, and to allow the prisoner to escape owing to a possible mistake—and I do not admit that there was a mistake—on the part of the prosecuting counsel would be to allow him to escape on the merest technicality and would work great injustice. My answer, therefore, to the question asked in the case, viz., whether this evidence

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was admissible, must be in the affirmative, and that the conviction should stand.

Since writing this judgment my attention has been called by my brother Kennedy to the case of *Reg. v. Cooper* (1), which, though not precisely in point, I think strongly confirms the opinion I have given. Cresswell J. sums up the position when he says (2): "His whole conduct is to be interpreted with reference to the charge made against him, and I think what was said by him under similar circumstances to the present is admissible."

The judgment of A. T. LAWRENCE J. was read by DARLING J. as follows:—I am of opinion that the evidence of the girl Taylor was admissible, and that the conviction should be affirmed.

The general rule is stated by Lord Herschell in these terms (3): "It is undoubtedly not competent for the prosecution to adduce evidence tending to shew that the accused has been guilty of criminal acts other than those covered by the indictment, for the purpose of leading to the conclusion that the accused is a person likely from his criminal conduct or character to have committed the offence for which he is being tried. On the other hand, the mere fact that the evidence adduced tends to shew the commission of other crimes does not render it inadmissible if it be relevant to an issue before the jury, and it may be so relevant if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental, or to rebut a defence which would otherwise be open to the accused." The relevance depends upon the issues actually in contest; whenever it is in issue whether the prisoner, though he did the act alleged, did it without any intention, i.e., accidentally, or without any criminal intention, i.e., innocently, such evidence may be given.

By shewing that the prisoner did an act of the same character under similar circumstances on other occasions, accident becomes improbable. That the same accident should repeatedly occur to the same person is unusual, especially so when it confers a

(1) 3 Cox, C. C. 547

(2) *Ibid.* at p. 550.

(3) [1894] A. C. at p. 65.

benefit on him. The degree of improbability will depend upon the number of times it is shewn to have occurred and the similarity of the circumstances on each occasion. If the act charged is manifestly an intentional act, but the defence is that it was honestly or properly done, such evidence is admissible to rebut this defence by shewing knowledge of some fact essential to guilty knowledge or by shewing that in other cases similar acts have been committed by the prisoner by the like means under the like circumstances. The number of cases and the peculiarity of the circumstances tend to shew the improbability of the innocent intention.

It is for this reason in cases of fraud, where it is necessary to shew a fraudulent intent in the prisoner, that other acts of the like character are briefly described as a system. There is no special rule of the law of evidence applicable to accident or to system. These are merely convenient phrases indicative of cases in which evidence of this character is admissible. A system is not necessarily criminal—most men carry on business on a system; they may even be said to live on a system. Where, however, acts are of such a character that, taken alone, they may be innocent, but which result in benefit or reward to the actor and loss or suffering to the patient, repeated instances of such acts at least shew that experience has fully informed the actor of all their elements and details, and it is only reasonable to infer that the act is designed and intentional, and its motive the benefit or reward to himself or the loss or suffering to some third person.

The mind of the prisoner can only be revealed by his words or by his acts. It is in many cases impossible to form a sound conclusion upon the state of his mind at a given moment, unless his words and acts under similar circumstances are subjected to investigation. It is for this reason that I think the words of Lord Herschell—"to rebut a defence which would otherwise be open to the accused"—are an essential part of the proposition of law. This idea is also expressed by Lord Alverstone C.J. in *Rex v. Wyatt* (1) when he says that such evidence is admissible "as negating any accident or mistake or the existence of any reasonable or honest motive."

(1) [1904] 1 K. B. 193.

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Any statement of the law which omits this latter part of the proposition would seriously cramp the administration of justice, and cannot be supported upon principle.

Roscoe in his *Digest of Evidence in Criminal Cases*, 12th ed. p. 80, says: "There are cases in which much greater latitude is permitted, and evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intention in doing the act complained of." The authorities, in my opinion, support this view.

In *Blake v. Albion Life Assurance Society* (1) it was necessary to shew that the defendant company knew of the fraud of Howard at the time they received the plaintiff's money. The acts of the company towards the plaintiff were all, taken alone, ordinary business transactions; in order to shew knowledge of the fraud it was necessary to shew that they had had other transactions of a similar character with other persons, and that "Howard" was sometimes "Gard," and sometimes "Rogers" and other assumed names, but that on each occasion the premium went to the company and no loan to the assured. In *Reg. v. Francis* (2) guilty knowledge that a certain ring was falsely described as a diamond ring was shewn by evidence of a previous dealing with a chain and several attempts to deal with other rings within a short space of time. Here the connection between the several acts lay in the nature of the goods, trinkets or jewellery, and the class of persons defrauded or attempted to be defrauded, viz., pawnbrokers. This rendered a plan or scheme of fraud probable. In *Reg. v. Rhodes* (3) evidence of two instances of obtaining eggs by the false pretence of an advertisement was admitted, although these eggs were obtained subsequently to the acts charged in the indictment. The business to which this advertisement related was said by the prosecution to be a sham or bogus business, and these two instances were held to throw a light back upon the prisoner's state of mind when he obtained the eggs for which he was indicted, the nexus or connection being the same advertisement of the same business. In *Reg. v.*

(1) 4 C. P. D. 94.

(2) L. R. 2 C. C. R. 128.

(3) [1899] 1 Q. B. 77.

*Ollis* (1) the prisoner was charged with obtaining money by false pretences on three cheques—on June 24, June 26, and July 6. At the trial evidence was admitted relating to a cheque which the prisoner was alleged to have obtained fraudulently by giving another valueless cheque dated July 5 for it. The prisoner had already been tried and acquitted of this fraud. It was held to be rightly admitted as evidence of guilty knowledge. Bruce J. differed because he considered the important question was the prisoner's knowledge of the state of his banking account, and it was not shewn that the cheque of July 5 had been returned dishonoured before July 6, when he gave the last of the cheques mentioned in the indictment. Inasmuch as the prisoner had been adjudicated a bankrupt in the previous May, and the account at the bank upon which all the cheques were drawn shewed a credit balance of only 3s. 6d., and nothing had been paid into or drawn out of it for three years, the majority of the Court thought the evidence admissible, Lord Russell of Killowen C.J. saying that the criticism of Bruce J. went rather to the weight of the evidence than to its admissibility. In *Rex v. Wyatt* (2) the prisoner was charged with obtaining credit (for lodgings and food) by fraud. Evidence was admitted of his having obtained lodgings, &c., at several other places and having left without paying for them. Evidence of the same character has been admitted for many years in coining cases, in cases of uttering forged documents, in cases of embezzlement, and in cases of murder. The cases relied upon as opposed to this view are not so when looked into. In *Reg. v. Oddy* (3) the charge was one of larceny and receiving of cloth; evidence was tendered that other cloth which had been stolen was found in the house of the accused. This evidence was rejected as not being admissible to shew guilty knowledge when receiving the cloth covered by the indictment. There was here no connection between the charge and the fact tendered in evidence except that both related to cloth. Each was found shortly after it was stolen, and several months had elapsed between the two larcenies. Recent possession of stolen goods is evidence of the larceny of the goods

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(1) [1900] 2 Q. B. 758.

(2) [1904] 1 K. B. 188.

(3) 5 Cox, C. C. 210.



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in question. It would be illogical to hold that the same fact, viz., recent possession, can be evidence of two crimes so widely different in the detail of their circumstances as theft and receiving knowing the thing to be stolen. (1) In *Reg. v. Holt* (2) evidence of facts alleged to constitute a similar pretence to that charged was rejected. It was inadmissible, for the pretence charged was that the prisoner had pretended that he had authority to receive money on behalf of his principal when he had not; the only defence raised was that in fact he had such authority. It was not relevant to that issue to shew he had received other money on the same statement: see Blackburn J. in *Reg. v. Francis*. (3) It tended to support the defence quite as much as the prosecution. In *Reg. v. Dale* (4), as reported, the admissibility of evidence of this class would seem to have been carried too far. The report lends colour to the view that this evidence was admissible when the only issue raised was as to the fact of the prisoner's having used the instrument. In such a case such evidence would not be admissible. It is to be observed, however, that the only ruling of the learned judge was one given during the opening statement of counsel for the prosecution. The evidence never was in fact admitted, for the prisoner pleaded guilty before any evidence was tendered.

In all cases in order to make evidence of this class admissible there must be some connection between the facts of the crime charged in the indictment and the facts proved in evidence. In proximity of time, in method, or in circumstance there must be a nexus between the two sets of facts, otherwise no inference can be safely deduced therefrom.

In the present case the prosecutrix Ethel Jones was an inmate of the prisoner's house. He had induced her to have sexual connection with him by promising to "keep her right." When she feared she was in trouble he said he would do so, and he used instruments upon her which he said would "bring it away." When arrested he stated that he had used the instruments for a lawful purpose, and that when she became very ill in consequence

(1) On this subject see now the Prevention of Crimes Act, 1871 (34 & 35 Vict. c. 112), s. 19.

(2) (1860) 30 L. J. (M.C.) 11.

(3) L. R. 2 C. C. R. at p. 130.

(4) 16 Cox, C. C. 703.

he administered drugs to allay the pain. In support of this defence it was suggested that he used the instruments when examining her for leucorrhœa, and that the subsequent illness was neither foreseen nor intended by him. The evidence of Taylor was tendered to rebut this defence. It was shewn that she too was an inmate of his house, that he had induced her to have sexual connection with him, that when her periods should have arrived and before she left for home he used the same instruments in the same way, saying he would "put her right, as he had put dozens of other girls before." If evidence of system were needed, this was such evidence. So also was the evidence as to a statement made by Nellie Cornes, a servant of the prisoner who was present at the operation, which statement was to the effect that the prisoner had "put her all right." The operation was unsuccessful in the case of Taylor; but that was due not to the nature of the operation, but to the stage of the pregnancy then reached, for the defendant told the witness that if she did not get right not to go more than six weeks and then he would operate again. In due time a child was born, for the maintenance of which the prisoner consented to an affiliation order.

It is impossible, without reversing a long series of cases, to say that the evidence of Taylor was not admissible. It shewed that the illness of the prosecutrix was the result of design and not of accident; it shewed that the prisoner's scheme or system when the indulgence of his passions had got girls into trouble was to use these instruments upon them to relieve himself from the burden of paternity. It tended to rebut the defence he set up of an innocent operation, and to negative any reasonable or honest motive for its performance.

*Conviction affirmed.*

Solicitors for prosecution: *Frederick Cooke & Son, Crewe.*

Solicitors for prisoner: *Flux, Leadbitter & Co., for H. W. G. Garnett, Crewe.*

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THE KING *v.* THE JUDGE OF THE MARYLEBONE  
COUNTY COURT AND THE GREAT WESTERN  
RAILWAY COMPANY.

*Ex parte* PHILLIPS.

*Railway—Regulation—Provisional Order—Demurrage of Trucks—Right of  
Action for Damages for Detention—Jurisdiction of Arbitrator—Great  
Western Railway Company (Rates and Charges) Order Confirmation Act,  
1891 (54 & 55 Vict. c. ccxxii.), ss. 5, 6.*

A railway Act confirming a provisional order, after providing that when merchandise is conveyed in trucks not belonging to the company the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks, enacted that "any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party":—

*Held*, that a claim by a trader for damages sustained by him in hiring another truck in the place of one delayed by the company was not a "difference arising under this section," and might therefore be pursued in the ordinary Courts.

RULE nisi for a mandamus to the county court judge of Marylebone to shew cause why he should not hear and determine an action in which Phillips & Co., Limited, were the plaintiffs and the Great Western Railway Company were the defendants. The action was brought for damages for the detention of a truck.

On October 21, 1905, the defendants, at the plaintiffs' request, sent off the plaintiffs' truck from Loudwater, Bucks, to a colliery in Wales to take coal from the colliery to Hampton-in-Arden. The truck did not arrive at the colliery until October 30, and in the meantime the plaintiffs had sent the coal to their customer at Hampton-in-Arden in a truck which they had hired from the colliery for 8s. 8d. They now sought to recover that sum from the railway company. The railway company admitted the delay, and that the charge for the truck was reasonable, but contended that the plaintiffs' claim was barred by s. 6 of the Great Western Railway Act, 1891 (54 & 55 Vict. c. ccxxii.) (1), and that the plaintiffs' remedy was by arbitration for demurrage.

(1) By the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxxii.), s. 5: "The company may charge for the services hereunder mentioned, or any of them,

The county court judge held that this contention was good, and that the jurisdiction of the Court was therefore ousted, and struck out the action.

*Cripps, K.C.* (*Schiller* with him), for the Great Western Railway Company, shewed cause against the rule. The jurisdiction of the county court judge was ousted by s. 6 of the Act of 1891, and the question could only be determined by an arbitrator appointed by the Board of Trade: *L. & N. W. Ry. Co. v. Donellan*. (1) The arbitrator has jurisdiction to determine all questions incidental to the differences arising under the section: *Midland Ry. Co. v. Loseby and Carnley*. (2) As is pointed out by Bigham J. in *Charrington, Sells, Dale & Co. v. L. & N. W. Ry. Co.* (3), it would be an anomaly if a claim at common law and a claim under the section existed side by side. The plaintiffs' claim, therefore, was one which could only be dealt with by an arbitrator under the section.

*Bailhache*, in support of the rule. This was not a difference arising under the section. It was a common law claim for damages sustained by the plaintiffs by the detention of their truck by the railway company. Sect. 6 has no application to empty trucks sent on by a railway company to be loaded. It

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when rendered to a trader at his request or for his convenience, a reasonable sum, by way of addition to the tonnage rate. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party. . . . (iv.) The detention of trucks, or the use or occupation of any accommodation, before or after conveyance, beyond such period as shall be reasonably necessary for enabling the company to deal with the merchandise as carriers thereof, or the consignor or consignee to give or take delivery thereof . . . and services rendered in connection with such use and occupation."

By s. 6: "Where merchandise is conveyed in trucks not belonging to the company, the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period, either by the company or by any other company over whose railway the trucks have been conveyed under a through rate or contract. Any difference arising under this section shall be determined by an arbitrator to be appointed by the Board of Trade at the instance of either party."

(1) [1898] 2 Q. B. 7.

(2) [1899] A. C. 133.

(3) [1905] 2 K. B. 437.



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only deals with the reasonableness of the sum charged for demurrage of loaded trucks. The difference with which the arbitrator has to deal must be one arising under the section. The cases that have been cited were decisions on s. 5 of the Act, which is in different terms, and they have no application to the present case. This was not a question of what would be a reasonable sum by way of demurrage, but was a claim for damages actually sustained by reason of the detention of the truck.

LORD ALVERSTONE C.J. In my opinion this rule should be made absolute. I desire to reserve any point should it ultimately turn out that some particular question raised in the action is one which is so clearly within the words of the section that the county court judge ought to say he would not entertain it. As the case now stands, there seems to me to be two answers to the objection taken by the railway company. The first is that the claim is not made under the section, and that no difference, therefore, arises under the section; and the second is that the words of the section itself are not sufficiently clear to oust the jurisdiction of the county court in respect of the particular matter for which the plaintiffs are claiming. The plaint before the county court was for damages occasioned to the plaintiffs by undue detention of their waggon and cost of hire of another waggon in place thereof. The claim, therefore, was for hiring a truck to convey goods in consequence of the delay of the defendants in forwarding the plaintiffs' own truck. Now if the words of the section, "a reasonable sum by way of demurrage for any detention," are meant to include damages for detention, I should have thought that the Court ought to have come to another conclusion. I should have thought then that the Legislature would have provided that any difference between a trader and a company respecting damages for detention of his trucks should be determined by an arbitrator. It has been held that if there is a clear direction in an Act of Parliament that a difference should be determined in any particular way, as by arbitration, it does not matter that the clause does not go on to say that the jurisdiction of the Court should be ousted: *Caledonian Ry. Co. v. Greenock*

and *Wemyss Bay Ry. Co.* (1) Therefore, if the section had said, or if I had been satisfied that it ought to be construed as saying, that all questions between the company and the trader respecting damages for detention should be determined by an arbitrator appointed by the Board of Trade, I should have been against Mr. Bailhache's contention. But I think that the claim as made does not come within the language of the section at all. It seems to me that the claim here made does not come within the words "a reasonable sum by way of demurrage for detention." I express no opinion upon the case in which the trader claims damages for detention of his truck, i.e., for the loss of the use of that particular truck. I doubt at present whether it could be said that it was not intended to make the arbitrator the sole tribunal in respect of what I may call the market value of the loss of the use of that particular truck; but whether or not a further limitation should be imposed upon the words of the section it is not necessary for me to decide in this case, because I am of opinion that there is, at any rate, fair ground for contending that the main claim of the plaintiffs does not come within the words of the section at all. Now, it is said that this view is contrary to the House of Lords' decision in *Midland Ry. Co. v. Loseby and Carnley*. (2) I think that is not so. In the first place, I do not consider that ss. 5 and 6 of the Act are to be regarded as exactly alike for this purpose. Sect. 5 is far more general in its terms: "The company may charge for the services hereunder mentioned . . . when rendered . . . a reasonable sum by way of addition . . . Any difference arising under this section shall be determined by an arbitrator . . . (iv.) The detention of trucks." The House of Lords have undoubtedly decided that all questions of that character must go to the arbitrator, and cannot be determined by the Courts. It seems to me it by no means follows that they would have held the same with regard to a claim of this kind arising under s. 6. I am not satisfied that any difference has arisen under that section. Therefore I think this rule for a mandamus should be made absolute.

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C.J.

(1) (1874) L. R. 2 H. L. (Sc.) 347.

(2) [1899] A. C. 133.

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DARLING J. I am of the same opinion. Sect. 6, which takes certain matters out of the jurisdiction of the Courts of law, should, I think, be construed with a strict regard to what are the matters which it removes from the power of the ordinary tribunals of the country. It says this: "Where merchandise is conveyed in trucks not belonging to the company, the trader shall be entitled to recover from the company a reasonable sum by way of demurrage for any detention of his trucks beyond a reasonable period." It is argued that this section only applies to loaded trucks, and is incapable of applying to a case like this, where the truck had gone on an outward journey loaded and was then unloaded, and the detention or demurrage occurred with regard to it while empty. I do not think that is a good contention. Here the words are "where merchandise is conveyed in trucks." These words, I think, apply where goods have been so conveyed, and by the contract under which the goods went the truck was to be sent back empty. Here I think that the demurrage or detention did occur "where merchandise is conveyed in trucks." Therefore, if that were his only point, I should be against Mr. Bailhache. But he takes this further point, that this claim was not a claim for demurrage at all, but for something else. I think that "demurrage" must be taken to mean the kind of charge for a truck being unemployed which one would properly call demurrage, and should not be held to include the equivalent of damages incurred by reason of the detention of the truck, yet that is the kind of claim which the plaintiffs here brought before the county court. It is perfectly plain that such damages could not be limited to such matters as are here claimed for. For example, a truck might contain goods of a perishable nature which would deteriorate by the truck being long detained upon the railway, and if that were to happen it seems to me that Mr. Cripps' contention would have to be that a claim for damages for that deterioration would be taken out of the power of the Court, and would have to go before the arbitrator. But that would be a claim for damages due to the detention of the truck, which could not accurately be called demurrage. Those are matters which the Legislature has not intended to take away from the jurisdiction of the Court, and I

think that only such claims which can properly, and without stretching language, be called demurrage are given to the arbitrator to decide. The rule must therefore be made absolute.

CHANNELL J. I agree. I base my judgment on the view that it is not made out here that there was any difference which could be said to arise under s. 6 of the Act. The section is a little difficult to understand. I agree that the particular truck comes within the first words of the section, and it seems to me that the section purports to give the trader some right which the Legislature thought he had not got. It has been suggested that it was intended to give him some sort of right to a daily sum for his trucks so long as they were detained, even although he could not prove any definite amount of damage. I do not say that that is all that the section means; it gives him a right, but I do not see that there is anything in the section to exclude his common law right to get damages for the detention of his property, and that is what he is suing for here. That seems to me to be the proper construction of the first part of the section. Then it goes on to say, "any difference arising under this section shall be determined by an arbitrator." I think that if the trader wishes to avail himself of this section and to rely on his right to a reasonable sum for the detention of the truck he must go before an arbitrator, and if he does so it is plain from the decisions that that arbitrator would have jurisdiction to decide any questions incidental to the case. For instance, he would, I think, have jurisdiction to decide whether the truck had been detained for more than a reasonable time. That is the sort of question which it is more easy for an arbitrator skilled in railway business to decide than for an ordinary tribunal. I do not, however, think that the judgment of the House of Lords in *Midland Ry. Co. v. Loseby and Carnley* (1) went much beyond that, and the difficulty which arises in the present case is whether the particular claim which the plaintiffs are making here can be said to be a "difference arising under the section." The railway company seeks to read those words as if they meant "any difference arising in respect of any claim which might have been

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made under the section." I do not think we can agree to that. The expression "any difference arising under this section" seems to me to have no application to a case which is not based on the section where the trader is claiming damages at common law for the detention of his truck. Possibly the claim might have been made under the section, but it has not been so made, and I cannot therefore see how there is a difference arising under the section. In order to decide in favour of the railway company it would, I think, be necessary to import into the section some such words as "any difference arising in respect of a matter which might in some way or another have been brought within the section." I do not think we should be justified in doing that, and I base my decision, therefore, entirely on the fact that it has not been shewn here that there is a difference arising under the section, and therefore that the section does not apply and the jurisdiction of the county court judge is not ousted.

*Rule absolute.*

Solicitor for defendants: *R. R. Nelson.*

Solicitors for plaintiffs: *Burn & Berridge.*

A. P. P. K.

[IN THE COURT OF APPEAL.]

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LUMSDEN *v.* THE SHIPCOTE LAND COMPANY.

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May 18.

*Solicitor—Costs—Delivery of amended Bill—Action for Work done—Reference to ascertain Amount due—Solicitors Act, 1843 (6 & 7 Vict. c. 73), s. 37.*

In an action by a solicitor for work done the particulars were described as having been delivered to the defendants in a signed bill of costs more than a month before action brought. The defendants denied liability, and also relied upon the fact that the plaintiff had delivered a prior bill of costs for a less amount. The jury found for the plaintiff on the question of liability, and a verdict was entered for him, but leave was refused to carry in the second bill for taxation. On appeal:—

*Held*, that the plaintiff was not bound by the first bill delivered, and that although, by reason of the proviso in s. 37 of the Solicitors Act, 1843, in the absence of special circumstances, there could be no reference to taxation under that Act after verdict, the Court had jurisdiction to refer the matter to a taxing Master, who would be entitled to take both bills into his consideration in arriving at the amount for which judgment should be entered.

APPEAL from a judgment of Ridley J. at the trial of the action with a jury.

The action was for work done and moneys paid by the plaintiff, acting as solicitor to the defendants, and the particulars were described in the statement of claim as having been delivered to the defendants in a signed bill of costs more than a month before action. The defendants denied indebtedness, and they raised as a defence that the plaintiff had delivered a bill of costs before that mentioned in the particulars, and was bound by the previously delivered bill, which was less in amount than that referred to in the particulars. At the trial the jury found a verdict for the plaintiff upon the question of the liability of the defendants. The learned judge ordered that judgment should be entered for the plaintiff for the amount found to be due on taxation, and refused leave to the plaintiff to carry in for taxation the second bill of costs.

The plaintiff appealed.

The Solicitors Act, 1843, s. 37, enacts that attorneys and solicitors are not to commence an action for fees till one month after delivery of their bills, and provides for reference of bills,

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whether relating to business transacted in Court or not, for taxation by the proper officer of the Court. The section contains the following proviso: "Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such . . . solicitor, . . . except under special circumstances to be proved to the satisfaction of the Court or judge."

*Manisty, K.C.* (*Frank Newbolt* with him), for the plaintiff. The cases as to not permitting a solicitor to send in a second bill of costs after delivery of a previous one are confined to reductions of the first bill delivered. The principle upon which the rule is founded is stated in *In re Thompson* (1) to be that a solicitor ought not to be allowed to send in a bill which he cannot support on taxation on the chance of getting it paid. In *Loveridge v. Botham* (2) a bill with additional charges was allowed to go to taxation, and in *In re Cartwright* (3) the solicitor was allowed to increase former charges where a series of bills had been sent in. In this case there is no increase of any item in the first bill, which was made as low as possible at the request of the defendants. When they repudiated liability the position was changed, and the plaintiff was entitled to make out a bill with scale charges. There had been no order for taxation of the first bill, and there was nothing to prevent the plaintiff from relying upon the second and amended bill. The most that could be said is that the delivery of a bill is strong evidence against an increase of charge in a subsequent bill for any of the items contained in the first bill, and presumptive evidence against any additional items, as stated in *Archbold's Practice*, 14th ed. p. 157, the authority given being *Loveridge v. Botham* (2); and the learned judge was wrong in thinking that there was any rule of law or practice which bound the plaintiff by the first bill which he delivered. If the objection to the sending in of a second bill is that the solicitor ought not to be allowed to avoid having to pay the costs of taxation by reason of the taxing off of one-sixth of the first

(1) (1885) 30 Ch. D. 441.

(2) (1797) 1 Bos. &amp; P. 49.

(3) (1873) L. R. 16 Eq. 469.

bill, that can only apply when there is a decrease in the amount claimed. [He cited *Anderson v. May* (1); *In re Walters* (2); *Re Chambers* (3); *Re Heather* (4); *In re Holroyde*. (5)]

*Waugh, K.C.*, and *A. Adair Roche*, for the defendants. The cases shew that the rule that a solicitor cannot deliver a second bill in respect of the same subject-matter without leave is not confined, as suggested, to a decrease in the amount claimed. It is clear that an addition of items that might be allowed on taxation might reduce the chance of the taxing off of a sixth. The rule laid down in *Loveridge v. Botham* (6) is a general rule, subject only to be modified where some mistake or error is discovered. The rule must be applicable to the case of a bill deliberately sent in, as to which no application has been made to the Court to permit amendments. Without the leave of the Court to deliver a second bill the first must be taken to bind the plaintiff. It was delivered in compliance with the requirements of the statute, and no second bill can meet those requirements which have been exhausted by the former bill. The consideration of the items of the plaintiff's claim was withdrawn from the jury by agreement at the opening of the plaintiff's case, and it must be taken, though it is not expressed, that the parties contemplated a reference to taxation under the statute, and the learned judge was right in so treating it. The case resembles *In re Woollett* (7), in which there was a reference to taxation after action brought, but before verdict. Further, the learned judge had a discretion, which he exercised, in determining that the plaintiff ought not to be allowed to substitute the second bill for the first as the basis of his action. [They cited *In re Wells* (8); *In re Carven* (9); *In re Walters* (2); *In re Park* (10); *In re Grant, Bulcraig & Co.* (11)]

VAUGHAN WILLIAMS L.J. I am far from saying that the defendants have not shewn a certain amount of authority for the

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(1) (1802) 2 Bos. & P. 237.

(2) (1845) 9 Beav. 299.

(3) (1865) 34 Beav. 177.

(4) (1870) L. R. 5 Ch. Ap. 694.

(5) (1881) 43 L. T. 722; 29 W. R.

599.

(6) 1 Bos. & P. 49.

(7) (1844) 12 M. & W. 504.

(8) (1845) 8 Beav. 416.

(9) (1845) 8 Beav. 436.

(10) (1889) 41 Ch. D. 326.

(11) [1906] 1 Ch. 124.



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proposition that the rule applied in the case of taxation under the Solicitors Act, 1843, and the obligation on a solicitor who has delivered a bill of costs to obtain leave before he can bring in a second bill for taxation, is a rule applicable not only in the case of the second bill being a reduction of the amount claimed in the first, but also to the case where it increases that amount. That seems to me to be right, but it is not necessary to decide that point, as the question does not arise in this case.

The facts of this case are that some seven gentlemen were engaged in a commercial adventure, and the plaintiff, who is a solicitor, was one of them, and was employed in the legal business of the adventure. His case is that he was invited to make his bill of costs as low as possible, and that he did so, to the advantage of those who had to pay the bill, which did not include certain scale charges that might have been inserted. Presently, however, the persons against whom the bill was made out took up the position of a total denial of liability, on the ground either that there was no retainer, or that the work was not done under the retainer but in the capacity of a co-adventurer; at all events, they denied their liability. But for that determination on their part these gentlemen could have got an order for taxation which would have involved an admission that they were liable. They did not do this, and, as they refused to pay, the plaintiff brought his action, in which the defendants set up the circumstances under which they denied liability. They also set up a plea, which as far as the facts stated in it are concerned was not in dispute, that the bill sued on was delivered after the delivery of a previous bill in respect of the same matters. All this time, and up to judgment in the action, the defendants were in a position to have taken out a summons to have the first bill taxed. I do not say what the result would have been, but it may be that the Court or a judge would have thought the case came within *In re Thompson* (1) and other cases in which a solicitor had sent in a bill on the chance of its being paid and then sent in a diminished bill in fear of a taxation, the cost of which he would have to pay. Such an alteration the Court would not allow. As I have already said, there are cases in which a second bill,

increasing the amount of the first, has been disallowed, and the same reasons may apply to such a case, for a bill may be increased by items which would probably be allowed, so as to lessen the danger of the solicitor having to pay the costs of taxation. The defendants, however, let the case go to trial, and the finding of the jury was against them on their contention of non-liability. The question is what the learned judge should then have done. The Solicitors Act, 1843, deals with the delivery of bills and reference for taxation, and contains this proviso: "Provided always, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor." In my judgment the ordinary practice in an action on a solicitor's bill is that the jury are told that they will not be troubled with the question of amount, and that question is settled by reference to a taxing Master, not under the Act of 1843, but as a referee to settle the amount. The question, therefore, is whether the order of the learned judge was right. In my opinion it was not, for I think that direction should have been given as part of the judgment that the bill which the plaintiff vouched in his particulars should be referred for taxation, not, as I have said, under the statute, but on a reference to ascertain the amount for which judgment ought to be entered. The learned judge seems to have made an order as if there were no verdict in an action and this were a mere case of taxation under the statute. When the matter comes before the Master, if the suggestion turns out to be true that certain of the things charged for were not done by the plaintiff professionally, but were done by him as one of the seven co-adventurers doing their best in a common cause, the Master will take that into consideration. There is nothing to prevent full justice being done in this way between the parties. I should like to point out that some of the rights that a client obtains against his solicitor on an order for taxation under the Act would not be obtainable on a reference after verdict in an action. I do not think that the rule as to payment of the costs of taxation if one-sixth of the

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The order appealed from must be set aside, and an order made directing judgment to be entered for the plaintiff, subject to a reference to a Master to ascertain the amount for which judgment should be entered.

STIRLING L.J. I am of the same opinion. I think that when the learned judge directed this taxation he should not have proceeded as if he were directing a taxation under the Solicitors Act, 1843. The proviso in s. 37 forbids a reference to taxation under the Act after verdict, unless there are special circumstances, and there were none in this case. Nevertheless, the Court has power by virtue of its general jurisdiction to ascertain, by reference to its officer, the proper amount to be paid to the plaintiff for his services. In point of fact there is no difference in principle between such a case as the present and an action to recover the amount due for work and labour done in any other case. It is within the jurisdiction of the Court to order that the items of a claim shall be gone into before a referee, and in the present case there is power to ascertain through a taxing Master the proper amount of remuneration. This principle is acted on constantly in the Chancery Division by a direction that bills which cannot be ordered to go before a taxing Master for taxation should be referred to him for modification, and not for taxation in the ordinary sense. As far as I am concerned, I think that in the present case the taxing Master has full power to deal with this bill so as to do justice between the parties without instructions from the Court.

FLETCHER MOULTON L.J. I am also of opinion that the appeal should be allowed. The case is one of a reference to a skilled tribunal after verdict to ascertain the correct amount of compensation due to the plaintiff. The point raised for the defence is that the action was brought upon a second and amended bill delivered by a solicitor. This affords no valid defence. A solicitor is a person who does professional work for his client just as other professional persons might. His position differs from theirs in two respects only, viz., in that he comes

under the Solicitors Act and is subject to the disciplinary powers of the Court. If he is under a disability to amend a bill that he has sent in, it must be by reason of one or other of those two things. It does not arise under the statute, for if it did the Court could not, as they certainly can, give leave to deliver an amended bill. As to the disciplinary power of the Court, I do not think that the Court has ever taken up the position that a solicitor cannot amend his bill. If taxation has been held or threatened it might be said that it was too late to amend, because the client's right to tax is given to him in order to check exorbitant demands, and the value of this protection would be lessened if the solicitor could amend an exorbitant bill when he found that taxation was imminent. Where there has been no taxation, and no steps towards taxation, I cannot see why the Court should prevent the solicitor from sending in a corrected bill, and I do not think that the Courts have done so. If a solicitor sends in a bill of costs, and subsequently amends it by sending in a second with increased charges, the first bill would afford evidence that the items in it were right. The passage in Archbold's Practice, which was referred to in the course of the argument, to the effect that "The delivery of a bill is strong evidence against an increase of charge in a subsequent bill for any of the items contained in the first bill, and presumptive evidence against any additional items," seems to me to describe correctly the position, and while on the one hand it is open to the plaintiff to send in an amended bill it is open to the defendants on the other hand to use the first bill as evidence in opposition to the new or increased items inserted in the second bill.

*Appeal allowed.*

Solicitors for plaintiff: *Stokes & Stokes, for J. G. Aitchison, Newcastle-upon-Tyne.*

Solicitors for defendants: *King, Wigg & Co., for Keenlyside & Forster, Newcastle-upon-Tyne.*

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June 22.

[IN THE COURT OF APPEAL.]

PEARSON *v.* WILCOCK.

*County Court—Administration Order—Subsequent Creditor—Remedy against Debtor—Bankruptcy (Administration Order) Rules, 1902, r. 15—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 122.*

By s. 122, sub-s. 1, of the Bankruptcy Act, 1883, where a debtor against whom a judgment has been obtained in a county court is unable to pay the amount forthwith, and where the whole of his indebtedness does not exceed 50*l.*, the county court may make an order for the administration of his estate; and by sub-s. 5, "when the order is made no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a county court, except with the leave of that county court, and on such terms as that court may impose . . ."

After an order had been made for the administration of the defendant's estate, under s. 122 of the Bankruptcy Act, 1883, the plaintiff, who had no notice of the order, obtained judgment in a county court against the defendant in respect of a debt subsequently incurred by him. On an application by the defendant the county court judge directed a stay of execution under s. 122, sub-s. 5, of the Act. On appeal:—

*Held*, that s. 122, sub-s. 5, applies to creditors of a debtor who has obtained an administration order under that section, whether their debts accrued due before or after the date of the order, and that the stay of execution was rightly made.

*In re Frank*, [1894] 1 Q. B. 9, discussed.

APPEAL from an order of the judge of the Bradford County Court.

In 1902 the defendant, who was indebted to various creditors to a total amount of 35*l.*, obtained from the county court judge an administration order under s. 122 of the Bankruptcy Act, 1883, the terms of the order being that he should pay the debts scheduled in his application by instalments of 4*s.* a month until he had paid them to the extent of 5*s.* in the pound. The order was never set aside or rescinded, and payments into court were from time to time made under it by the defendant. In June, 1905, the plaintiff, who was unaware of the existence of the administration order, recovered judgment in the Bradford County Court against the defendant for the sum of 5*l.* 1*s.* 1*d.* for groceries supplied, and the amount was ordered

to be paid by instalments of 5s. a month. The defendant made default in payment of the second instalment, and the plaintiff issued execution for the balance of the judgment which then became due and was unpaid. The defendant thereupon applied to the county court judge under s. 122, sub-s. 5, of the Bankruptcy Act, 1883, for a stay of execution upon the ground that the administration order was still in existence and unsatisfied. The county court judge held that the provisions of s. 122, sub-s. 5, were not confined to creditors at the date of the making of the administration order, but that they applied to all creditors whether their debts accrued due before or after that date; he therefore granted the application, and made an order for a stay of execution. (1) The plaintiff appealed.

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May 15. *Compston*, for the plaintiff. The plaintiff was entitled to issue execution upon his judgment, and the order of the county court judge was wrong. An administration order differs in several essential respects from an ordinary bankruptcy; there is no vesting of the debtor's property in a trustee, and only

(1) By s. 122, sub-s. 1, of the Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), power is given to a county court judge, where a judgment debtor is unable to pay forthwith the amount of a county court judgment and his whole indebtedness does not exceed 50%, to make an order for the administration of his estate and the payment of his debts by instalments or otherwise, either in full or to such extent as appears practicable under the circumstances.

By sub-s. 5: "When the order is made no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a county court, except with the leave of that county court, and on such terms as that court may impose; and any county court or inferior court in which proceedings are pending against the debtor in respect of

any such debt shall, on receiving notice of the order, stay the proceedings, but may allow costs already incurred by the creditor, and such costs may, on application, be added to the debt notified."

By sub-s. 10: "Any creditor of the debtor, on proof of his debt before the registrar, shall be entitled to be scheduled as a creditor of the debtor for the amount of his proof."

By sub-s. 12: "Any person who after the date of the order becomes a creditor of the debtor shall, on proof of his debt before the registrar, be scheduled as a creditor of the debtor for the amount of his proof, but shall not be entitled to any dividend under the order until those creditors who are scheduled as having been creditors before the date of the order have been paid to the extent provided by the order."

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the creditors who are included in the schedule to the order have a locus standi enabling them to enforce payment under the administration order. In an ordinary bankruptcy a subsequent creditor cannot come in and prove under the former bankruptcy; his only remedy, if his debtor does not pay him in full, is against newly acquired property of the debtor, and that remedy must be exercised before the trustee in bankruptcy lays claim to that property. If the view of the county court judge as to the effect of s. 122, sub-s. 12, is right, an analogous state of things will not prevail in the case of an administration order; a subsequent creditor will have no rights as against the after-acquired property, but must be postponed until all the scheduled creditors have been paid everything to which they are entitled under the administration order. Further, if the only remedy of a subsequent creditor is to be added to the list of scheduled creditors, there might often in practice be an administration order for more than 50*l.*; and if there were many subsequent creditors the payment of the instalments under the administration order might conceivably extend over a period of more than six years, which is prohibited by r. 7, sub-r. 8, of the Bankruptcy (Administration Order) Rules, 1902. The county court judge was wrong in holding that the plaintiff came within the words "no creditor" in s. 122, sub-s. 5, of the Bankruptcy Act, 1883; the true interpretation of that sub-section is to limit those words to creditors at the time when the administration order was made, but the county court judge has applied them to all persons who are creditors at any time while the administration order remains in existence. The plaintiff has a right, unless it is taken away by express enactment, to issue execution under s. 146 of the County Courts Act, 1888. There was no discretion in the county court judge to stay execution under s. 153 of the County Courts Act, 1888; under that section the expression "other sufficient cause" means a cause ejusdem generis with sickness, and mere inability to pay the debt or damages is not a sufficient cause: *Attenborough v. Henschel*. (1) It is plain from s. 122, sub-s. 8, of the Bankruptcy Act, 1883, that the administration order comes to an end as soon as the debts in existence and scheduled at the date of

(1) [1895] 1 Q. B. 833.

the order have been satisfied to the extent required by the order. Subsequent creditors can either enforce their debts in the ordinary way, or, if they elect to do so, they can come in and prove under the administration order under s. 122, sub-s. 12, in which case they will receive no dividend until the original creditors have been fully paid to the extent provided by the order and the order has been, in effect, worked out.

Further, where a commitment order is applied for upon a judgment summons, Order xxv., r. 42, of the County Court Rules, 1903, provides that it is to be refused in cases where there has been an administration order and the debt was incurred before the date of the order; but if the debt was incurred after the administration order was made, the county court judge is bound to make a commitment order. A commitment order being only a form of execution, it would be inconsistent with that rule to hold that s. 122, sub-s. 5, of the Act of 1883 applies to creditors whose debts accrued due after the date of the administration order. The stay granted by the county court judge deprives the plaintiff of his right to obtain execution by means of a commitment order, and a right to issue or obtain execution can only be taken away by express enactment. Then, under r. 15, sub-r. 1 (3), of the Bankruptcy (Administration Order) Rules, 1902, an administration order may be set aside or rescinded "where the debtor subsequent to the date of the order has obtained credit to the extent of 2*l.* or upwards without informing the creditor that he has an administration order"; the object of this provision is not, as the county court judge held, to afford a protection to a subsequent creditor by getting the administration order rescinded, but to enable one of the original creditors to get it set aside. This is shewn by sub-r. 2 of that rule, which provides that the order may be set aside or rescinded on the hearing of a judgment summons or on the application of any person entitled to take proceedings under r. 13, and this latter rule makes it clear that the person appointed to have the conduct of the order is the person to take proceedings to enforce the terms of the order by means of a judgment summons or to have the order set aside or rescinded, or in his default a creditor may, by leave of the Court, take proceedings for that purpose.

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C. A. That cannot mean a subsequent creditor who has not come in  
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In *In re Frank* (1) the Divisional Court held that while an administration order is in existence the county court judge has no power, under s. 122, sub-s. 5, of the Act, to give leave to a creditor to issue execution against the property of the debtor. That decision only goes to this, that a creditor whose debt accrued due before the date of the order, and who is therefore bound by the order, cannot have any remedy outside the order against the debtor's property, and it does not apply so as to cut down the right of a subsequent creditor to issue execution. Both in bankruptcy and in the case of administration orders the Legislature has placed subsequent creditors in a better position as regards enforcing their debts against the debtor than the rest of the creditors, and r. 15, sub-rr. 1 (3) and 2, enable a creditor who is bound by the order, when he finds that a subsequent creditor is getting an advantage over him, to apply to the judge to set aside or rescind the order.

The defendant did not appear.

KENNEDY J. I am of opinion that the decision of the learned county court judge was right, and substantially for the reasons that he gave in his judgment. It was thought desirable by the Legislature that poor persons should be able to take advantage of the relief afforded by bankruptcy, and the method adopted was to relieve them from the pressure of their debts where they did not exceed 50*l.*, and so to enable them to start afresh. This object is attained by the debtor filing a schedule of his debts in the county court, power being given to the county court judge to make an order as to payments out of the debtor's future earnings, which order the debtor is bound to obey. The part of the Bankruptcy Act, 1883, which deals with these matters is Part VII., and it is headed "Small Bankruptcies." The particular section is s. 122, which, after dealing with the cases in which an administration order may be made, provides by sub-s. 5 that, when the order is made, no creditor shall have any remedy against the person or property of the debtor in

respect of any debt which the debtor has notified to a county court, except with the leave of and on the terms imposed by the Court; and further, that any county court or inferior court in which proceedings are pending against the debtor in respect of any such debt is to stay the proceedings on receiving notice of the order, but may allow the costs incurred by the creditor to be added to the debt notified. I agree with the contention on behalf of the appellant that *prima facie* this sub-section applies to existing creditors, but in my judgment it would be too narrow a construction to confine its application to them, and for this cogent reason, that if subsequent creditors were allowed to exercise their ordinary remedies for enforcement of their rights while an administration order is running, it would be clearly impossible for the debtor to obey the order unless he were aided by the restraining power of the Court.

Put shortly, the Court's restraining power is, that on being notified by the debtor of the existence of a subsequent debt, it can protect the debtor against proceedings by the creditor to satisfy his debt, but may in the exercise of its discretion give leave to the subsequent creditor to issue execution, or may on his application make a committal order. The parties are dealt with equitably; the subsequent creditor is restrained from enforcing his remedies unless the Court makes an order in his favour; if, however, it can be shewn that during the currency of an administration order the debtor has become possessed of other means sufficient to satisfy the subsequent creditor's debt without interfering with the scheme under the administration order, the section provides that the Court may give the subsequent creditor leave to enforce his remedies against the person or property of the debtor. But it lies upon the creditor to satisfy the Court that he ought to have leave to exercise his ordinary remedies. This is clear, because sub-s. 12 of s. 122 would be unnecessary if the subsequent creditor could get leave to issue execution as a matter of course by merely applying to the Court. In my opinion the provisions of s. 122 mean this: as the subsequent creditor cannot have his ordinary remedies without the leave of the Court, leave may and will be refused if the effect of granting it would be to prevent the debtor from obeying the

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terms of the administration order; the creditor is, however, not to be altogether excluded from all relief, and he may therefore go to the registrar and have his debt added to the schedule of debts, though his right to a dividend is postponed until the terms of the administration order have been complied with and the claims of the original creditors satisfied to the extent provided in the order. There would be no necessity for the provision of sub-s. 12 as to the addition of his debt to the schedule if the subsequent creditor could as of right satisfy his claims by issuing execution against the debtor's personal property. In bankruptcy all parties must to some extent suffer and a subsequent creditor, who has no knowledge of the existence of an administration order, may think it hard that, having given credit to his debtor, he should be unable to come in *pari passu* with the original creditors; but it must be remembered that, if he can shew that he ought to be allowed to have a remedy, and that it can be had without interfering with the administration order, he has an absolute right under sub-s. 12 to have his debt added to the schedule and to come in as a creditor. I do not think that there is anything in Order xxv., r. 42, which has been cited to us, that at all conflicts with this view.

Then reference has been made to r. 15 of the Bankruptcy (Administration Order) Rules, 1902, which deals with the rescission of administration orders, sub-r. 1 (3) of which provides for rescission where the debtor has subsequently to the date of the order obtained credit to the extent of 2*l.* or upwards without informing the creditor that he has an administration order, and it has been contended that under these provisions the rescission can only be ordered upon the application of one of the original creditors. In my opinion that is not a reasonable construction of the rule. It is difficult to understand what the framers of the rule could have meant, if the creditor could at once use the ordinary machinery for the enforcement of his rights. Under that rule it seems to me that either an original or a subsequent creditor could apply to have the administration order rescinded in a case where the debtor is obtaining credit without disclosing to his new creditor the existence of the administration order.

As to the case of *Attenborough v. Henschel* (1), which was cited in argument and is of course binding upon us, I cannot concur in the contention that under the power given by s. 153 of the County Courts Act, 1888, the Court has no discretion to stay execution in a case where an external cause, such as an administration order under s. 122 of the Bankruptcy Act, 1883, has come into existence to prevent the debtor from discharging his debts in the ordinary way; I cannot say that in such a case a county court judge would be unable to exercise a discretion as to staying execution. In my opinion the case cited does not decide that such a case as the present might not come within the purview of that section. I am clearly of opinion that under the Bankruptcy Act, 1883, the county court judge has in such a case as the present power to stay execution by the subsequent creditor.

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A. T. LAWRENCE J. I am of the same opinion. I agree that the appellant's counsel was right in his contention that the right of a judgment creditor to issue execution can only be taken away by express words; but I can feel no hesitation in saying that express words sufficient to take away the ordinary right are to be found in s. 122, sub-s. 5, of the Act of 1883. The word "creditor" in that sub-section is not, in my opinion, to be confined to creditors existing at the date of the administration order. No such words are to be found in sub-s. 5, but it is sought to introduce them upon the construction of the various sub-sections. The language used in sub-s. 5 appears to be perfectly plain, and the words "no creditor" mean what they say, that is, no one who is a creditor, either at the time of the administration order or afterwards. This construction is absolutely necessary if the administration order is to have its full scope and effect. If every subsequent creditor could as of right levy execution against the debtor's property, it is obvious that the administration order would at once come to an untimely end. The true intent and meaning of an administration order is to enable the debtor to go on earning money to pay his debts, and to protect him against his creditors and indirectly against himself. The effect of an

(1) [1895] 1 Q. B. 833.



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order ought to be to induce tradesmen not to give unlimited credit, and when a county court judge is asked to interfere under s. 122, sub-s. 5, he ought to exercise a discretion and consider whether the debtor has so behaved himself as to be entitled to protection; such matters are legitimate subjects for his consideration, and in some cases no doubt the discretion would be exercised in favour of a stay, in others against it. If the discretion is exercised against the creditor, he still has a right under sub-s. 12 to come to the Court and have his debt scheduled. It is true that the latter is not a very advantageous remedy, but it is the best that, under such circumstances, the creditor can get. Under r. 15, sub-r. 1 (2), the creditor can, however, come in and say that the debtor omitted to disclose the existence of the administration order, and that therefore the whole administration order ought to be set aside, and in that case the debtor will lose the great advantage given to him by s. 122. That is, in my judgment, the scheme of the Act and of the rules, and the county court judge has given them their proper meaning.

*Appeal dismissed.*

W. J. B.

The plaintiff, by leave of the Court of Appeal, appealed.

June 13. *Compston*, for the plaintiff, urged the same arguments as in the Court below.

The defendant did not appear.

*Cur. adv. vult.*

June 22. COZENS-HARDY L.J. read the following judgment:— In order to appreciate the points raised in this appeal it is necessary to consider in what respects an administration order under s. 122 of the Bankruptcy Act, 1883, differs from an adjudication in bankruptcy under the general provisions of the Act. In the first place, an administration order does not divest the property of the debtor. It leaves him master of his small property, both present and future. But this is subject to the provision in s. 122, sub-s. 4, enabling, not any individual creditor, but the registrar of the county court on behalf of all

the creditors, to issue execution against the debtor's goods whenever they exceed 10*l.* in value: see Form 7 in the Appendix to the Bankruptcy (Administration Order) Rules, 1902. This is a power which can be exercised at any time during the continuance of the order. It in effect makes all future property of the debtor, during the continuance of the order, subject to the control of the Court, and perhaps explains the use of the phrase in s. 122, sub-s. 1, "an order providing for the administration of his estate." In the second place, in an ordinary bankruptcy the only creditors are those who can claim in respect of debts at the date of the receiving order (s. 37). No provision is made for proof by subsequent creditors. But subsequent creditors are contemplated as being within the scope of the administration order. Sect. 122, sub-s. 12, expressly enacts that they may be scheduled as creditors, though they will not be entitled to any dividend until scheduled creditors at the date of the order have been paid to the extent provided by the order: see also rr. 10, 11, and 12 of the Bankruptcy (Administration Order) Rules, 1902.

This being the general scheme of the Act under s. 122, it remains to consider how sub-s. 5 ought to be construed. It says that, during the continuance of the order, "no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a county court, except with the leave of that county court, and on such terms as that court may impose"; and the question for our decision is whether this applies to subsequent creditors or only to creditors before the date of the order. The county court judge and the Divisional Court have held that it applies to all creditors, and upon the whole I think this is the correct view. It is not unreasonable to hold that any creditor who can claim to come in under and to get the benefit of the administration order should not be allowed to assert rights which would seriously lessen the operation of the order, and take away property which, in a certain sense, is being administered by the Court. This is strictly on the lines of ss. 9 and 10 of the Bankruptcy Act, 1883. I am not pressed by the argument that subsequent creditors are in a worse position than original creditors. In ordinary bankruptcies

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there are preferential creditors, but all creditors, whether preferential or postponed, are bound to prove for their debts. The policy of this legislation was to discourage the giving of credit to these small debtors against whom an administration order has been made, and r. 15, sub-r. 1 (3), makes it a ground for setting aside or rescinding an order that the debtor has subsequently obtained credit to the extent of 2*l.* or upwards without informing the creditor of the existence of the order. In a case like the present the Court might, on the application of the plaintiff, rescind the order and thus leave him free to levy execution, or, without rescinding the order, might give leave under s. 122, sub-s. 5, to proceed with the execution. I am conscious that this is not consistent with the view expressed by at least one of the judges who decided *In re Frank* (1), but the words seem to me sufficient to confer the jurisdiction, although it would only be exercised under very exceptional circumstances.

The plaintiff's counsel founded an argument upon Order xxv., r. 42, of the County Court Rules, 1903, made under the County Courts Act, 1888, which limits the power of commitment of a debtor whose debt was incurred before the date of the administration order, but makes no corresponding provision where the debt was incurred subsequently. I do not think any great weight attaches to this argument. Rule 42 cannot fairly be regarded as an interpretation of s. 122, sub-s. 5, or as cutting down its full effect.

For these reasons I think the appeal should be dismissed.

COLLINS M.R. I agree with the judgment which has been read by Cozens-Hardy L.J.

SIR GORELL BARNES, PRESIDENT, read the following judgment:—This is an appeal by the plaintiff against the judgment of the Divisional Court dismissing an appeal from an order of the county court judge at Bradford made in the action on October 24, 1905, ordering that execution under a judgment recovered by the plaintiff against the defendant should be stayed.

(1) [1894] 1 Q. B. 9.

The plaintiff had recovered judgment against the defendant on June 27, 1905, for 5*l.*, to be paid by instalments of 5*s.* per month. The judgment was in respect of groceries which had been supplied by the plaintiff to the defendant. One instalment was paid under the judgment, and execution for the balance, which was due on default, was issued on October 12, 1905, and that execution was stayed by the learned county court judge under sub-s. 5 of s. 122 of the Bankruptcy Act, 1883. The ground upon which the stay was obtained by the defendant was that there had been an administration order under the above section for the administration of the defendant's estate some three years before. The debt in question was contracted since that order, and the defendant did not inform the plaintiff of the administration order prior to the issue of the execution. Under the administration order the defendant had to pay 4*s.* per month on the debts to which it applied, and he had made a certain amount of the payments. The learned county court judge held that the plaintiff, by virtue of the provisions of sub-s. 12 of s. 122, was only entitled to be scheduled as a creditor of the debtor, and was not entitled to any dividend until the creditors who had been scheduled as having been creditors before the date of the order had been paid to the extent provided by the order.

The point raised is of some importance with regard to small bankruptcies, a scheme for dealing with which is contained in s. 122. That scheme differs from the general scheme provided for by the Bankruptcy Act, 1883, under which, on the making of a receiving order, the official receiver is constituted receiver of the property of the debtor. Thereafter, except as directed by the Act, no creditor to whom the debtor is indebted in respect of any debt provable in the bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings unless with the leave of the Court, and on such terms as the Court may impose (s. 9); and the Court may at any time after presentation of a bankruptcy petition stay any action, execution, or other legal process against the property or person of the debtor (s. 10, sub-s. 2); and an order of discharge shall release the bankrupt from all debts provable in the bankruptcy, with

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certain exceptions not material to consider (s. 30); and all debts and liabilities, with certain exceptions not material to consider, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order shall be deemed to be debts provable in the bankruptcy (s. 37); and the property of the bankrupt divisible amongst his creditors shall comprise, inter alia, all such property as may belong to or be vested in the bankrupt at the commencement of the bankruptcy or may be acquired by or devolve upon him before his discharge (s. 44); and, under s. 54, upon a debtor being adjudged bankrupt his property vests in the official receiver until a trustee is appointed, and then in the trustee. The effect of this scheme, speaking in general terms, is that all the property which the bankrupt has or will have before his discharge is to be applied in liquidation of his debts and liabilities existing at the time of his bankruptcy.

Under s. 122, dealing with small bankruptcies, the county court may make an order providing for the administration of the debtor's estate, and for the payment of his debts by instalments or otherwise, and either in full or to such extent as to the county court under the circumstances of the case appears practicable, and subject to any conditions as to his future earnings or income which the Court may think just (sub-s. 1). The section contains no provisions for vesting the estate in a receiver or trustee or other person, but leaves the debtor in possession of his estate, unless under sub-s. 4 his goods exceeding in value 10*l*. (with certain exceptions) are seized under an execution issued by the registrar of the county court at the request of a creditor. Sub-s. 5 provides as follows:—"When the order is made no creditor shall have any remedy against the person or property of the debtor in respect of any debt which the debtor has notified to a county court, except with the leave of that county court and on such terms as that Court may impose; and any county court or inferior court in which proceedings are pending against the debtor in respect of any such debt shall, on receiving notice of the order, stay the proceedings, but may allow costs already incurred by the creditor, and such costs may, on application, be

added to the debt notified." The real question in the case depends upon whether that sub-section applies to cases of debt contracted subsequently to the administration order, or is confined to debts existing at the time of that order.

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Under sub-s. 7 the order is to be carried into effect in such manner as may be prescribed by general rules. General rules have been made dated July 10, 1902, under which a debtor who desires to obtain an administration order has to file with the registrar of the Court a request and a statement setting out a list of his creditors and debts, and stating that he is not indebted to any other person. The request has to be accompanied by an affidavit deposing that to the best of his knowledge, information, and belief the whole of his creditors and the true amounts due to all of them are set out in the list. Notice has to be sent to the creditors mentioned in the list of the day and hour when the request will be heard, and the rules contain provisions for objections to debts scheduled being made, or to the composition or instalments offered, and for notice of the order having been made being sent to each creditor whose debt has been admitted or who has proved, and for objections being made within a limited time. Under s. 122, sub-s. 9, notice of the order has to be sent to the registrar of county court judgments, and posted in the office of the county court of the district in which the debtor resides, and sent to every creditor notified by the debtor, or who has proved; and under sub-s. 10 any creditor of the debtor, on proof of his debt before the registrar, shall be entitled to be scheduled as a creditor of the debtor for the amount of his proof; and then by sub-s. 12 it is provided that "any person who after the date of the order becomes a creditor of the debtor shall, on proof of his debt before the registrar, be scheduled as a creditor of the debtor for the amount of his proof, but shall not be entitled to any dividend under the order until those creditors who are scheduled as having been creditors before the date of the order have been paid to the extent provided by the order." Under r. 7, sub-r. 8, of the rules, no administration order shall be made under which the payment of instalments, if kept up without default, would extend over a period of more than six years from the date of the order. Rule 13 provides for some

C. A. person to be appointed to have the conduct of the order, and  
1906 defines his duties; and r. 15 provides for the rescission of the  
PEARSON order by the judge in five cases, one of which is where the  
v. debtor subsequent to the date of the order has obtained credit to  
WILCOCK. the extent of 2*l.* or upwards without informing the creditor that  
The President. he has an administration order, and the administration order  
may be set aside or rescinded under this rule on the hearing of a  
judgment summons, or on the application of any person entitled  
to take proceedings under r. 13. Sub-s. 13 of s. 122 of the Act  
provides that, when the amount received under the order is  
sufficient to pay each creditor scheduled to the extent thereby  
provided and the costs of the plaintiff and of the administration,  
the order shall be superseded, and the debtor shall be discharged  
from his debts to the scheduled creditors.

Now it is important to notice that under this scheme, although  
the order is for the administration of the estate, the debtor is  
left in possession thereof, yet sub-s. 4 appears to give the  
registrar of the county court power at any time during the  
existence of the order at the request of any creditor to seize the  
debtor's goods as therein provided; and, although sub-s. 5 pro-  
vides that when the order is made no creditor shall have any  
remedy against the person or property of the debtor in respect of  
any debt which the debtor has notified to a county court, except  
with the leave of that county court and on such terms as that  
Court may impose, it does not in terms confine the restriction to  
debts notified in the list attached to the request for an order, and  
would therefore appear to admit of notification of a debt being  
given afterwards, and sub-ss. 9 and 10 cover the case of creditors  
whose debts have not been notified but who have proved; and it  
would seem that, if it appeared that such creditors during the  
existence of the order tried to enforce their claims otherwise than  
under the order, the debtor could notify the Court and bring the  
restriction into operation in respect of those debts; and so, if  
the section deals with creditors becoming such after the date of  
the order, it would seem that their debts could be notified if it  
became necessary to do so. Although sub-s. 5 *prima facie* deals  
with creditors at the date of the order it does not say so in  
terms, and sub-s. 12 shews that the scheme contemplates affecting

debts to creditors becoming such after the date of the order. What, then, is the effect of that last mentioned sub-section? It would be a useless and inoperative section if, notwithstanding it, any creditor who became such after the date of the order could proceed against the debtor unaffected by the order and seize any goods which had not been seized under sub-s. 4. For unless sub-s. 12 compels such a creditor, when his debt is notified by the debtor, to come in under the order, he would not be in the least likely to do so. In order, therefore, to give due effect to sub-s. 12 it seems necessary to read sub-s. 5 as applying to any creditor, whether his debt was incurred before or after the order. The county court judge and the Divisional Court thought that this construction should be adopted, because, otherwise, creditors subsequent to the order would be able to prevent the debtor from carrying out the provisions of the order.

It was urged that by this construction the subsequent creditors would suffer hardship, but the Court, under sub-s. 5, can allow their proceedings to continue, and would probably do so if the debtor were in a position to pay his new debts without interfering with his payments under the order. The case of *In re Frank* (1), which was cited on the question of leave to proceed, was a case in which apparently one of the creditors at the time of the order was endeavouring to get leave to proceed although he might originally have objected to the order, and probably that led to the decision: see the judgment of Wright J. Moreover, in my opinion that case placed a too limited restriction on the power of the Court to give a creditor leave to proceed. It was also urged that the judge cannot set aside the order under r. 15 except on the hearing of a judgment summons or on the application of the person entitled to take proceedings under r. 13, and that, therefore, a creditor in the position of the plaintiff could not apply to have the order set aside; but in my opinion the terms of the rule do not thus limit the powers of the judge, who could in my judgment have set aside the order in this case on the application of the plaintiff, if he had thought fit. In my opinion Order xxv., r. 42, of the County Court Rules, 1903, does not prevent the effect of s. 122 being what I have above indicated.

(1) [1894] 1 Q. B. 9.

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The case is not free from doubt and difficulty, owing to the manner in which the section is drawn; but on the whole I have come to the conclusion that the judgment appealed from is right, and that the appeal must be dismissed.

*Appeal dismissed.*

Solicitors for plaintiff: *Fielder, Fielder & Jones, for Fox & Crabtree, Bradford.*

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### THE KING v. OTTO MONSTED, LIMITED.

*Adulteration—Importation of Margarine—Package not conspicuously marked—Appeal from Conviction of Court of Summary Jurisdiction—Jurisdiction of Court of Quarter Sessions to hear Appeal—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63)—Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36)—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 25.*

Sect. 25 of the Sale of Food and Drugs Act, 1899, which provides that, unless the context otherwise requires, "an offence under this Act shall be treated as an offence under those Acts" (i.e., the Sale of Food and Drugs Acts), does not confer the right of appeal to a Court of quarter sessions from a conviction by a Court of summary jurisdiction, under s. 1 of the Act of 1899, of the offence of importing into the United Kingdom margarine in packages not conspicuously marked.

*So held by Ridley and Darling JJ., Bray J. dissenting.*

RULE nisi calling upon the defendants, Otto Monsted, Limited, to shew cause why an order made by justices for the county of Essex on January 3, 1906, quashing a conviction by justices of the peace for the said county, sitting as a Court of summary jurisdiction, bearing date October 6, 1905, should not be quashed.

An information was laid before the last-mentioned justices by one Beard, an officer of His Majesty's Customs, against the defendants, who were a company incorporated under the Companies Act, 1862 to 1898, having their registered office at Southall, in the county of Middlesex, for that the defendants, on May 30, 1905, at Tilbury Docks, in the county of Essex, and within the limits of the Port of London, did import into the United Kingdom, per the steamship *Minnehaha* from New York, certain goods entered

at His Majesty's Customs as "Oleo Margarine, edible," packed in sixty-two packages marked "B. 341," and which goods were, upon examination thereof, found to be margarine, and that the packages containing the goods unlawfully were not conspicuously marked "Margarine," as required by s. 1 of the Sale of Food and Drugs Act, 1899 (1), contrary to the form of the statutes in that case made and provided.

The justices convicted the defendants.

The defendants appealed to the Chelmsford Quarter Sessions.

The appeal came on for hearing on January 3, 1906, when a preliminary objection was taken upon behalf of the Customs that the appeal did not lie.

The Court of quarter sessions overruled the objection and quashed the conviction.

The rule nisi was then obtained.

*Hume Williams, K.C.*, and *Frank Dodd* shewed cause. The right of appeal is given by s. 25 of the Sale of Food and Drugs

(1) Sale of Food and Drugs Act, 1899, s. 1, sub-s. 1: "If there is imported into the United Kingdom any of the following articles, namely:—(a) margarine . . . except in packages conspicuously marked 'margarine' . . . the importer shall be liable, on summary conviction, for the first offence to a fine not exceeding twenty pounds, for the second offence to a fine not exceeding fifty pounds, and for any subsequent offence to a fine not exceeding one hundred pounds."

Sub-s. 2: "The word 'importer' shall include any person who, whether as owner, consignor, or consignee, agent, or broker, is in possession of, or in anywise entitled to the custody or control of, the article; prosecutions for offences under this section shall be undertaken by the Commissioners of Customs; and subject to the provisions of this Act this section shall have effect as if it were part of the

Customs Consolidation Act, 1876."

Sect. 25: "In this Act, unless the context otherwise requires . . . The expression 'local authority' means any local authority authorized to appoint an analyst for the purposes of the Sale of Food and Drugs Acts, and the expression 'public analyst' means an analyst so appointed: Other expressions have the same meaning as in the Sale of Food and Drugs Acts, and an offence under this Act shall be treated as an offence under those Acts."

Sect. 28, sub-s. 1: "This Act may be cited as the Sale of Food and Drugs Act, 1899, and the Sale of Food and Drugs Act, 1875, and the Sale of Food and Drugs Act Amendment Act, 1879, and the Margarine Act, 1887, and this Act may be cited collectively as the Sale of Food and Drugs Acts, 1875 to 1899, and are in this Act referred to as the Sale of Food and Drugs Acts."

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Act, 1899, for by that section an offence under the Act of 1899 is to be treated as an offence under the Sale of Food and Drugs Acts, which by s. 28, sub-s. 1, of the Act of 1899 include the Sale of Food and Drugs Act, 1875. Sect. 3 of the Margarine Act, 1887 (50 & 51 Vict. c. 29), contains the definition of margarine. A right of appeal is given by s. 12 of the Margarine Act, 1887, by its reference to the Sale of Food and Drugs Act, 1875, for by s. 23 of the Act of 1875 an appeal lies from a Court of summary jurisdiction to a Court of quarter sessions. The words "those Acts" in s. 25 of the Act of 1899 mean the Acts mentioned in s. 28, sub-s. 1, of that Act. In order to see how the penalty for an offence under the Act of 1899 is to be enforced the Act of 1875, as slightly amended by s. 19 of the Act of 1899, must be referred to. The meaning of the words in s. 1, sub-s. 2, of the Act of 1899, "subject to the provisions of this Act this section shall have effect as if it were part of the Customs Consolidation Act, 1876," is that, subject to an offence under the Act of 1899 being treated as an offence under the Act of 1875, this section shall have effect as though it were part of the Customs Consolidation Act, 1876. The words were put in because it was contemplated that disputes as to the amount of duty to be paid would arise. Disputes of that nature are dealt with by ss. 30 to 38 of the Customs Consolidation Act, 1876. It is clear that where there is a charge under s. 5 of the Act of 1899 in respect of an offence relating to margarine-cheese the provisions of the Margarine Act, 1887, apply, and in that case there would be an appeal by virtue of s. 12 of that Act, which incorporates s. 23 of the Act of 1875. The result of the contention on the part of the Crown would be that upon a charge under s. 1 of the Act of 1899 of importing margarine-cheese in packages not conspicuously marked there would be an appeal, whereas upon a charge under the same section in respect of margarine there would be none. That cannot have been intended.

Sect. 218 of the Customs Consolidation Act, 1876, which provides for the recovery of penalties, was repealed, before the Sale of Food and Drugs Act, 1899, came into operation, by s. 14 of the Customs and Inland Revenue Act, 1879 (42 & 43 Vict. c. 21), and re-enacted by s. 11 of that Act. Therefore, if the Legislature

had intended that proceedings under the Act of 1899 should be governed by the Act of 1876, it would have included in s. 1, sub-s. 2, of the Act of 1899 the Act of 1879. As this was not done, the inference is that this offence must be treated as an offence under the Sale of Food and Drugs Act, 1875, and not under the Customs Consolidation Act, 1876, and that, therefore, an appeal to quarter sessions lies under s. 23 of the Act of 1875.

[The Customs Consolidation Act, 1876, ss. 73, 74, 75, 76, 154 168, and the Customs and Inland Revenue Act, 1879, ss. 11, 14, were also referred to.]

*Sir John Lawson Walton, A.-G.*, and *R. D. Muir*, in support of the rule. Sect. 1 of the Sale of Food and Drugs Act, 1899, creates a new offence, and adds it to those which already existed under the Customs Consolidation Act, 1876; and the prosecution is to take place as provided by the Act of 1876. This is an offence committed at the port of discharge, and it was not intended to leave it to be dealt with by the police. The intention was to give the customs officials a right to deal with an offence committed by an importer before there has been any sale to the prejudice of a purchaser. If the argument on behalf of the defendants is right, it would follow that they would have a right of appeal, while there is no appeal with regard to offences committed by an importer under the Customs Consolidation Act, 1876. There is a complete code of offences under the Act of 1876, and there is no appeal with respect to them upon questions of fact. It was not intended by the Act of 1899 to create an anomalous right of appeal in the present case. Elaborate precautions are taken to prevent a mistake upon the part of a customs officer before a prosecution is commenced. Sect. 1 of the Act of 1899 deals not merely with a new offence, but one of an entirely different character to those which had previously been created. The intention was to stop the adulterated article at the port of discharge. It was not intended that the matter should be dealt with by the police like a sale inland, but by the customs officer at the port of discharge. By s. 1, sub-s. 3, the Commissioners of Customs are empowered to take samples of imported articles of food, and sub-s. 2 directs that the prosecution is to take place in accordance with the Customs

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Consolidation Act, 1876. The words "subject to the provisions of this Act" are satisfied without importing the right of appeal. All the sub-sections which follow impose duties on customs officers, duties which are not included in the Customs Consolidation Act, 1876. The argument on behalf of the defendants involves the proposition that the words "treated as an offence under those Acts" imply the right of appeal. Sect. 25 of the Act of 1899 is a definition clause. The word "treat" is equivalent to "mean." The use of the word "treated" is far too slender a basis to import the right of appeal. By s. 25 of the Act of 1899 an offence under that Act is to be treated as an offence under the Sale of Food and Drugs Acts, "unless the context otherwise requires." Sect. 1 of the Act of 1899 does otherwise require, for it makes an offence with respect to margarine a customs offence. The nature of the jurisdiction of the customs is very wide. This is apparent from ss. 42, 186, 202, and 204 of the Customs Consolidation Act, 1876. The importation of adulterated food was intended to be put on the same basis as the importation of silver which might have a false mark upon it. The words "subject to the provisions of this Act" in s. 1, sub-s. 2, of the Act of 1899 are not appropriate words for giving the right of appeal, because the Act of 1899 gives no right of appeal. There is no right of appeal under the Customs and Inland Revenue Act, 1879. Under the Sale of Food and Drugs Acts the customs authorities are treated differently from other authorities, for, while in general an appeal to quarter sessions is given to a person convicted of an offence punishable by the Act of 1875, by s. 30 of that Act imported tea may be examined by persons appointed by the Commissioners of Customs and if necessary destroyed, and in that case there is no appeal. Under s. 20 of the Act of 1875 the proceedings are to be taken under the Summary Jurisdiction Act, 1848 (11 & 12 Vict. c. 43). Therefore, if a conviction under the Act of 1899 is to be dealt with in the same way as if it were under the Act of 1875, not only the right of appeal, but all the provisions of the Act of 1848 are imported. That result would make the provision in s. 1, sub-s. 2, of the Act of 1899 that the section is to have effect as if it were part of the

Customs Consolidation Act, 1876, meaningless. By s. 53 of the Summary Jurisdiction Act, 1879, that Act and the Act of 1848 are applied to all Revenue Acts. The Act of 1876 has a code of its own. It contradicts the Summary Jurisdiction code in many respects. For example, an information under the Summary Jurisdiction Acts must be laid within six months after the matter of complaint arose; in the code of the Act of 1876 the period of limitation is three years. Under the Act of 1876 two or more offences may be charged in one information, but under the Summary Jurisdiction Acts only one complaint can be charged in each summons. A warrant can be executed by a customs officer in any part of the United Kingdom without being backed. That cannot be done under the Summary Jurisdiction Acts. The power given to justices under s. 22 of the Act of 1875 to have articles analysed is different from the provisions as to analysis in s. 1 of the Act of 1899. That shews that s. 1 of the Act of 1899 is to be governed by the code of the Customs Act, 1876, and not by the code of the Summary Jurisdiction Acts. Sect. 1 of the Act of 1899 stands apart from the rest of the Act. The real object of the words "shall be treated as an offence under those Acts" in s. 25 of the Act of 1899 was to deal with cumulative penalties. The Act of 1899 increases penalties under previous Acts upon subsequent convictions, and the words would apply, for example, where there had been a conviction under the Act of 1875, another under the Act of 1887, and a third under the Act of 1899, for which a cumulative penalty was imposed by that Act. Under s. 9 of the Act of 1899 the maximum penalty is 2*l.*, and as a rule no appeal is given by any statute where there is only a penalty of that amount. Customs Acts have not hitherto provided for a right of appeal, while Excise Acts have. If a right of appeal is given by the Act of 1899, it will be for the first time and with no corresponding right to the customs. The authorities shew that there may be cases of great hardship and yet there is no right of appeal: *Rex. v. Surrey Justices* (1); *Reg. v. Stock*. (2) No right of appeal appears to be given by the Sale of Food and Drugs Act Amendment Act, 1879. The only new offence created by that

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(1) (1788) 2 T. R. 504.

(2) (1838) 8 Ad. &amp; E. 405.

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Act is under s. 4, and it might well have been intended that there should be no appeal in that case. Whatever the hardship may be, a right of appeal cannot be implied: *Reg. v. Middlesex Justices*. (1) The words "the like proceedings shall be taken" or their equivalents must be used: *Reg. v. Surrey Justices* (2); *Tracey v. Pretty*. (3) The Act of 1887 adopts this course in s. 12. Penalties under the Act of 1899 are enforced under s. 11 of the Customs and Inland Revenue Act, 1879, which replaces s. 218 of the Act of 1876, that section having been repealed by s. 14 of the Customs and Inland Revenue Act, 1879. Sect. 28 of the Sale of Food and Drugs Act, 1899, although it provides for citing the Acts together, does not say they shall be read together.

[Sects. 8, 16, and 17 of the Sale of Food and Drugs Act, 1899, were also referred to.]

BRAY J. I have the misfortune in this case to differ from my learned brothers, and I have therefore to give judgment first. I am of opinion that the Sale of Food and Drugs Act, 1899, does give an appeal, and the order made ought not to be quashed. The section relied upon as giving the right of appeal is s. 25 of that Act, and the words are, "An offence under this Act shall be treated as an offence under those Acts."

The first question is, whether an offence under s. 1 of the Act of 1899 is "an offence under this Act." I think it is. I think these words ought to be read according to their natural interpretation, and I see no reason for saying that an offence under s. 1 is not "an offence under this Act." Then come the words "shall be treated as an offence under those Acts." They are very wide words, and seem to me to mean what they say, and that the same proceedings shall be taken and the same consequences shall follow. There are penalties provided, and those penalties will be enforced in the same way, and if there be an appeal provided by those Acts then an appeal lies also. The Act of 1899 is very difficult to construe, because the words are so general, but I can only read those words in their ordinary

(1) (1882) 9 Q. B. D. 41.

(2) (1869) L. R. 5 Q. B. 87.

(3) [1901] 1 K. B. 444.

signification, and in their ordinary signification it seems to me that they involve a right of appeal, the same right of appeal that is given under the Acts referred to. I believe under the other Acts there is a right of appeal to both parties, and so both parties can appeal here.

There is one other expression to be dealt with, viz., "unless the context otherwise requires," in s. 25. If the words of s. 1 sub-s. 2, were merely "and this section shall have effect as if it were part of the Customs Consolidation Act, 1876," I think I should be obliged to hold that the context did otherwise require; but it says specially, "and subject to the provisions of this Act this section shall have effect . . . ."—in other words, that the provisions of this Act, where they differ from the Customs Consolidation Act, 1876, shall have effect rather than those in the Customs Consolidation Act, 1876. It is said that they refer to s. 1. If that were so, s. 1, sub-s. 2, would read, "and subject to the provisions of this section it shall be read to take effect . . . ."; but it says, "subject to the provisions of this Act." Sect. 25 of the Act of 1899 is one of "the provisions of this Act," and it seems to me that the meaning is that s. 25 shall have precedence over the Customs Consolidation Act, 1876. There is nothing opposed to this construction in the words of s. 25, "unless the context otherwise requires," because sub-s. 2 of s. 1 has itself provided that where there is any conflict this Act, i.e., the Act of 1899, shall have precedence.

Under these circumstances it seems to me there was an appeal, and the order of the Court of quarter sessions should stand.

DARLING J. I am of a different opinion. The Act of 1899 is a most difficult one to construe so as to put an intelligible and consistent meaning upon all parts of it; but I have come to the conclusion that it was intended to add to what amounts to a code in regard to matters which are dealt with by the customs authorities. The Act in s. 1 is directed to the provision of precautions against the importation of agricultural and other produce insufficiently marked. That having been secured by sub-s. 1 of s. 1, sub-s. 2 says that, "subject to the provisions

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of this Act, this section shall have effect as if it were part of the Customs Consolidation Act, 1876." If it is to have effect as though it were part of the Customs Consolidation Act, 1876, then there would be no appeal from a conviction. Immediately before those words it says, "prosecutions for offences under this section shall be undertaken by the Commissioners of Customs." I think that it was intended to put the new offence with regard to the importation of margarine created by s. 1 among the offences with which the Commissioners of Customs are permitted, and obliged, to deal, and that it is intended by the words "this section shall have effect as if it were part of the Customs Consolidation Act, 1876," that the proceedings followed shall be consistent with those which are taken for other offences in which it is the duty of the Commissioners of Customs to prosecute for offences against the Customs Consolidation Act, 1876.

As to the words in sub-s. 2, "subject to the provisions of this Act," if I could see that there were in the Act of 1899 some definite, plain, unmistakable provisions which led to a different conclusion than that which I have expressed, I should say that it was intended to take this matter out of the sort of code binding upon the Commissioners of Customs, and to have offences under the Act treated in a different way. Sect. 25 says, "unless the context otherwise requires," certain expressions shall have certain meanings, and, among other things, "An offence under this Act shall be treated as an offence under those Acts"—that is, under those Acts which may be cited as the Sale of Food and Drugs Acts. I do not think that to say that "An offence under this Act shall be treated as an offence under those Acts" is a sufficiently plain way of saying that, although the Commissioners of Customs are to prosecute, the incidents of that prosecution shall be different from the incidents in other cases where they prosecute, so that, whereas there would be no appeal in those other prosecutions, there shall be an appeal in such a prosecution as this. The words are by no means clear. I perfectly well recognize that they may be read as my brother Bray reads them, but the fact that they are not clear leads him to one conclusion and it leads me to another, viz., that because

they are not clear they cannot be held to take this case (where the Commissioners of Customs prosecute) out of the ordinary course of such prosecutions, and to place this prosecution, as far as the procedure only goes, under the provisions of a different Act of Parliament.

I do not think that the words "subject to the provisions of this Act" necessarily oblige one to take that view; and therefore I have come to the conclusion—though not without a great degree of hesitation, and not with very much certainty that my opinion is the right one—that no appeal lies.

RIDLEY J. I have come to the same conclusion as my brother Darling; but I agree also with my brother Bray in thinking that the Act of 1899 is a very difficult one to construe. I think, however, upon the whole that the best conclusion we can arrive at is that the intention was that this offence, prosecuted only by the Commissioners of Customs, was intended to fall within the code which may be called the Customs Code. It is true that that does not appear in so many words in the Act of 1899, and it is also true that the first section which deals with this particular offence is a part of a statute which deals with many other matters which do not fall within the jurisdiction of the Customs Department, but which do fall within the same province as matters dealt with by the other statutes relating to the sale of food and drugs. But upon the whole I think that the intention I have indicated must be taken to be that of the Act of 1899.

The construction of the words is certainly open to argument. Sect. 1, sub-s. 2, says that prosecutions of this kind are to be undertaken by the Commissioners of Customs, "and subject to the provisions of this Act this section shall have effect as if it were part of the Customs Consolidation Act, 1876." That appears *prima facie* to mean that it is the Customs Consolidation Act, 1876, which must be looked at in order to find the provisions relating to these offences. I think that is undoubtedly so, but it is true, as pointed out by my brother Bray,\* that the words "subject to the provisions of this Act" introduce some qualification.

Now I look at "the provisions of this Act." What are the provisions of the Act of 1899? First, I think it possible to say

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that they would be fairly, though not completely, satisfied by reference to the provisions in s. 1; but the observation may rightly be made upon that construction that, if that be the only intention, the words should have been, "subject to the provisions which follow in this section." The words, on the contrary, are, "subject to the provisions of this Act." I therefore prefer not to rest my view upon that somewhat narrow reading of the words "subject to the provisions of this Act." I think it is better to take s. 25, which says, "In this Act, unless the context otherwise requires,"—leaving out the intermediate paragraphs—"other expressions have the same meaning as in the Sale of Food and Drugs Acts, and an offence under this Act shall be treated as an offence under those Acts." Although the context of the Act of 1899 does not require in so many words that this offence relating to the customs authorities, and dealt with by them, shall be dealt with otherwise than as an offence under the Sale of Food and Drugs Acts, I think I find in the context of the Act the intention that it shall be. I think this offence is a different matter, and upon a different foundation, and I have considerable doubt whether the judgment that I am giving would not be sufficiently rested upon these words.

But there is another reason which has led me to this conclusion, and it is this: I think, although not without hesitation, that the words "An offence under this Act shall be treated as an offence under those Acts" ought not to be interpreted as giving the right of appeal. There is no decision that anyone has been able to cite to us in which it has been held that the words "treated as an offence" will carry an appeal. I think that the word "proceedings" is distinctly different, and, being of opinion that the law as laid down in *Rex v. Surrey Justices* (1) is still good, and that an appeal must be given either by the express words of the statute or by necessary implication, I think it would be going too far to say that the words, "An offence under this Act shall be treated as an offence under those Acts" would carry such a right, when it is apparent, as was pointed out by Mr. Muir in argument in support of the rule, that there is another way in which those words can be satisfied.

I think that is a sufficient reason upon which to found my judgment. But there is another, viz., an offence under s. 4 of the Sale of Food and Drugs Act Amendment Act, 1879, is not subject to appeal. How are we to deal with the words in the Act of 1899, "An offence under this Act shall be treated as an offence under those Acts," when an offence under those Acts does not always carry a right of appeal? As I read the Acts, the Act of 1875 gives the right to appeal, and the appeal section was repeated in the Act of 1887; but, whether intentionally or by some inadvertence, the particular offence, which no doubt is not one of great magnitude, mentioned in s. 4 of the Sale of Food and Drugs Act Amendment Act, 1879, was not referred to. Therefore it is a fact that there is one offence under those Acts which is not the subject of appeal. How, then, can you say that the words "An offence under this Act shall be treated as an offence under those Acts" are apt to give a right of appeal? They are certainly not apt, but extremely inapt, because there is one exception. That vitiates the argument in favour of the right of appeal, because one of "those Acts" does not give the right of appeal.

For these reasons, though with much hesitation, I have come to the conclusion that no appeal lies in the present case.

*Rule absolute.*

Solicitor for applicant: *Solicitor of Customs.*  
Solicitor for defendants: *G. Trenam.*

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July 10.GINGELL, SON & FOSKETT, LIMITED *v.* STEPNEY  
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*Market—Manorial Market—Extent of Franchise—New Streets—Dedication—Presumption.*

From time immemorial the lord of the manor of Stepney had held a market in High Street, Whitechapel, in that manor. At some time subsequent to 1840 two narrow streets running through private property and not used for market purposes were widened and made into new streets by the Commissioners of Woods and Forests under the compulsory powers of the Metropolis Improvement (Additional Thoroughfares) Act, 1840.

In 1870 a third street, entirely new, was cut through private property, consisting mainly of houses, by the Metropolitan Board of Works under the compulsory powers of the Whitechapel and Holborn Improvement Act, 1865. These Acts did not mention the market rights, but the market was in fact held in the new streets shortly after they were made, as well as in High Street, and certain modern railway and tramway Acts contained provisions preventing the companies interfering with it in the several streets :—

*Held*, that these facts justified a presumption—(a) that the lord's market franchise extended to the whole manor; and (b) that the new streets were dedicated to the public subject to the exercise of that franchise.

*De Rutzen v. Lloyd*, (1836) 5 A. & E. 456, 459, and *Attorney-General v. Horner*, (1884) 14 Q. B. D. 245; (1885) 11 App. Cas. 66, applied.

## NON-JURY ACTION.

The plaintiffs were salesmen in the Whitechapel Hay and Straw Market, which belonged to the lord of the manor of Stepney, and was under the control of the defendants as successors to the trustees of the parish of St. Mary, Whitechapel, who were given control thereof under the Whitechapel Improvement Act, 1853 (16 & 17 Vict. c. cxli.). The market was held on Tuesday, Thursday, and Saturday. For very many years the plaintiffs and other salesmen had placed their hay carts in Commercial Street, Leman Street, and Commercial Road East (hereinafter called Commercial Road), as well as in High Street, where there was an admitted market, and the defendants had in fact received tolls in respect of those carts wherever standing, accounts of tolls payable being rendered by the salesmen, without stating the position of the carts.

On or about May 11, 1904, the defendants, as successors to the trustees of the parish of St. Mary, Whitechapel, and the borough engineer and surveyor of pavements for the metropolitan borough of Stepney, in exercise of the powers respectively conferred upon them by the Whitechapel Improvement Act, 1853, and the Borough of Stepney (Whitechapel) Scheme, 1901, confirmed by an Order in Council of March 25, 1901, and the defendants, as a local authority executing the office of and being surveyors of highways within the meaning of the Metropolis Management Acts, by writing sealed with the common seal of the defendants and signed by the said borough engineer and surveyor of pavements, jointly and severally made certain orders and directions for the regulation of the said market intituled "Metropolitan Borough of Stepney—Parish of Whitechapel—Orders and directions for the regulation of the Whitechapel Hay Market," and containing (inter alia) the following provisions:—

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"1. No cart waggon or other vehicle loaded with hay or straw brought into the parish of Whitechapel for sale on the usual market days shall (except with the consent of the borough engineer and surveyor of pavements previously obtained) be placed or stand in any highway or street of the said parish and borough save and except the following, namely:—

1. The Whitechapel High Street.
2. So much of the Commercial Road as extends from the Whitechapel High Street to Union Street.
3. Buckle Street.
4. So much of Colchester Street as extends from Leman Street to Plough Street.
5. Plough Street.
6. Goulston Street.

Provided always that the highways or streets or portions thereof above mentioned and numbered 2 3 4 5 and 6 shall not be used or occupied for placing or standing carts waggons or other vehicles as aforesaid until the space allocated for the purposes of the market in the Whitechapel High Street shall be fully utilized and occupied or until such street has become impeded by reason of too many carts waggons or other vehicles standing and being therein.

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"9. The borough council and the said borough engineer and surveyor of pavements do hereby give notice that in cases where the above orders and directions are not complied with the penalties under the Acts of Parliament applicable hereto will be strictly enforced and that the market regulator has been authorized and empowered to take any waggon cart or other vehicle not placed or standing in compliance with such orders and directions to the Whitechapel Destructor Depot, George Yard E."

A copy of the said orders and directions under the borough council's common seal and signed by the borough engineer and surveyor of pavements, together with a copy of a plan referred to in such orders and regulations, was publicly affixed in a conspicuous part of the said High Street, and a like copy was also sent by registered post to each hay and straw salesman in the said borough accustomed to avail himself of the accommodation afforded by the market, including the plaintiffs.

A rough sketch of the locus in quo is subjoined :—



On Saturday, May 27, 1905, the plaintiffs, with the view of testing their rights, placed three vans in Leman Street during market hours, at a time when High Street was full, except a space opposite the plaintiffs' premises, which was necessarily kept vacant for access to their premises and as standing room for their salesmen.

The defendants removed the vans.

The plaintiffs claimed (*inter alia*) :—

3. A declaration that they were entitled to place their hay and straw carts and vans (*a*) upon the western line of tramway in Leman Street, between the north end of Leman Street and Great Alie Street and south of the cross-over tramways; (*b*) upon the western line of tramway in Commercial Street, between Wentworth Street and High Street, Whitechapel; and (*c*) in Commercial Road, all in the parish of Whitechapel, during the hours of the hay and straw market.

4. A declaration that when there was not sufficient standing room in High Street, Whitechapel, for carts or waggons loaded with hay or straw intended to be sold in the said market the plaintiffs were entitled to place such carts or waggons in one or more of the streets adjoining the said High Street, and that the defendants were not entitled to order such carts into Buckle Street, Colchester Street, and Plough Street, which did not adjoin the said High Street.

No declaration was asked as to Goulston Street.

*Avory, K.C.*, and *Frampton*, for the plaintiffs. As far as High Street is concerned, the market is admittedly an ancient market vested in the lord of the manor of Stepney, which includes the whole of Whitechapel parish. It cannot be identified in any charter or grant, and therefore his title rests on prescription or lost grant. The market is first mentioned in 11 Geo. 3, c. xv. (1770), entitled "An Act for the better paving that part of the High Street in the parish of Saint Mary Matfellow, otherwise Whitechapel, which lies in the county of Middlesex, and for removing obstructions and annoyances therein." That Act appoints paving commissioners, and empowers them to direct where the hay carts are to stand during the paving, and

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after the paving it empowers them to direct the hay carts brought into the parish for sale "on the usual market days" to stand in or near the middle of the said street at such distances . . . as the commissioners direct, with a penalty for disobedience and power of removal. It also empowers the commissioners to impose a rate on High Street for defraying expenses, but only five-sixths of the rate is to be imposed on the houses situate on the south side of High Street between Red Lion Street (now Lemn Street) and the City. The market probably did not then extend further eastward.

The Act then recites that sixpence is due for every cart or waggon of hay "brought into the said parish and sold on the usual market days," twopence whereof is due to the lord of the manor of Stepney "as owner or proprietor of the said market," twopence to the parish for cleansing purposes, and twopence to the frontagers, and provides that the sixpence is to be paid to the commissioners' nominees, who are to pay twopence thereout to the lord of the manor. The Act also settles the market hours of "the hay market held in the said High Street," to which at this time it was probably confined in practice, though the Act speaks of tolls on carts "brought into the said parish." This Act was repealed by the Whitechapel Improvement Act, 1853 (16 & 17 Vict. c. cxli.). The commissioners were replaced by trustees, who were incorporated as "the trustees of the parish of St. Mary, Whitechapel," with a corporate seal: ss. 14, 27. Sect. 43 continues the sixpenny toll, with twopence thereout to the lord of the manor. Sect. 44 applies part of the balance in reduction of High Street rates. Sect. 45 provides that a register of all hay and straw sold is to be kept. Sect. 46 provides that during all such times as any new pavement or any public works shall be carrying on in the High Street where the said hay market hath been "usually" held, and until completion thereof, the trustees may order the hay carts to stand in other streets, and after completion of the works may order them to stand "in or near the middle of such street" at such distances as they may direct: provided always, that in case "at any time or times" they consider the thoroughfare of the High Street impeded by too many standing hay carts, then and "upon every such occasion" it shall be lawful for their surveyor to order so

many thereof as he thinks expedient to stand in such streets and other places "adjoining" High Street as to him seem convenient for the purpose, with a penalty for non-compliance with such orders. Sect. 47 provides that tolls may be levied by distress. These sections and s. 4 (short title) are still in force. The rest of the Act was repealed by the Borough of Stepney (Whitechapel) Scheme, 1901, confirmed by an Order in Council of March 25, 1901. There is nothing, of course, in s. 46 to justify the defendants' general regulations of 1904, and in any case the streets specified therein do not adjoin High Street.

Now, as the market belongs to the lord of the manor as such, the presumption is that it may be held anywhere in the manor: Pease and Chitty on Markets, p. 37; *Curwen v. Salkeld* (1); and in course of time it has, in fact, been extended to Commercial Street, Leman Street, and Commercial Road. This extension is proved by user, and the present market in all four streets is in fact recognized in various Acts of Parliament and reports. For instance, the North Metropolitan Tramways Act, 1870 (33 & 34 Vict. c. clxxii.), s. 5, alters the proposed route in High Street, and provides that there is to be no interference with the carrying on of the hay and straw market. That, of course, only applies to High Street. The North Metropolitan Tramways Act, 1871 (34 & 35 Vict. c. clxxix.), ss. 21, 28, provides that there is to be no interference with the hay market in High Street, and orders a deviation of the proposed route in Commercial Road. The report of the committee of the Whitechapel Board of Works in March, 1878, shews that the market was then held in High Street, Commercial Street, Leman Street, and Commercial Road. The Metropolitan and District Railways (City Lines and Extensions) Act, 1879 (42 & 43 Vict. c. cci.), s. 38, provides that the companies are not to obstruct the Whitechapel Hay and Straw Market. The North Metropolitan Tramways Act, 1887 (50 & 51 Vict. c. xii.), s. 9, provides that for the protection of the Whitechapel Hay and Straw Market and the hay and straw salesmen the tramway in Commercial Street between Wentworth Street and High Street shall be constructed as a double line with cross-overs to admit of shunting, and that the salesmen shall, "as against the

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company," be entitled to occupy the west line in market hours, but the section is not to abridge the rights of the board of works for the Whitechapel district. The North Metropolitan Tramways Order, 1888, s. 10, scheduled to and confirmed by the Tramways Orders Confirmation (No. 3) Act, 1888 (51 & 52 Vict. c. cxxii.), contains a similar provision for the protection of the salesmen in Leman Street as far as Great Alie Street.

The defendants' recent regulations exclude the plaintiffs from all three streets.

*Macmorran, K.C.*, and *Courthope-Munroe*, for the defendants. The Acts of 1770 and 1853 merely recognize a market in High Street, though the latter Act enables the trustees to place the carts in adjoining streets when High Street is full. But the plaintiffs cannot stand outside High Street without the permission of the borough council. The title is based on prescription or the presumption of a lost grant, and the Acts of 1770 and 1853 point to a grant of a market in High Street only. The actual user in Commercial Street, Leman Street, and Commercial Road cannot raise any prescription or presumption, as the dates of these streets and the circumstances under which they were made are well known.

Commercial Street was formerly a narrow street or alley called Essex Street, entered by an archway from High Street. No cart could get through. The portion of Leman Street north of Great Alie Street was a narrow street called Red Lion Street, obviously useless for market purposes. The Act of 11 Geo. 3, c. xii. (1770), under which it was paved, makes no mention of market rights. Sometime after 1840 Essex Street was widened into Commercial Street, and Red Lion Street was widened so as to form part of Leman Street. This was done by the Commissioners of Woods and Forests under the compulsory powers of the Metropolis Improvement (Additional Thoroughfares) Act, 1840 (3 & 4 Vict. c. 87). The freeholders, leaseholders, and occupiers of the property taken were all scheduled, and none of it belonged to the lord of the manor.

Commercial Road formerly only came from the east as far as Church Lane. In 1870 it was run through to High Street by the

Metropolitan Board of Works under the compulsory powers of the Whitechapel and Holborn Improvement Act, 1865 (28 & 29 Vict. c. iii.). This Act does not contain an ownership schedule, but there is nothing to shew that the property taken belonged to the lord, and presumably it belonged to several owners. In each case the property taken consisted mainly of houses.

Even assuming that the Court were to presume that the lord's franchise extended to the whole manor, it would also be necessary to presume either that these new streets formed parcel of the manor or that they were dedicated subject to the franchise. The former presumption cannot be made as to Commercial Street and Leman Street, of which the ownership is known, and it ought not to be made against the public in the case of Commercial Road without some evidence of ownership. The latter presumption might possibly be made if the streets had been made by private owners and nothing was known as to the circumstances under which they were laid out. But where public authorities have taken private house property under statutory powers for the purpose of making new streets it is hardly to be presumed that those streets were dedicated subject to market rights not mentioned in the statutes, and to which, from the nature and ownership of the property, they were not previously subject.

The railway and tramway Acts relied on are only local and personal Acts, and the special sections are merely statutory contracts by the companies with the Legislature acting on behalf of the salesmen. They give the salesmen certain rights against the companies, but none whatever against the public, and, except possibly as evidence of user, they are really irrelevant: Maxwell on Statutes, 4th ed. p. 450. It may be that the general regulations made by the defendants as controllers of the market cannot be justified under s. 46. But the real point at issue is whether the plaintiffs can obstruct Commercial Street, Leman Street, and Commercial Road with their carts without the permission of the defendants. Unless those streets form part of the market the defendants are clearly entitled to remove the obstructions either as surveyors of highways under the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 96—*Reynolds v. Presteign Urban*

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*Avory, K.C.*, in reply. For very many years the market has been held in the new streets. The presumption, therefore, is either that the new streets belonged to the lord of the manor, or that they were dedicated subject to the market franchise. The railway and tramway Acts bind the local authority, who were, of course, represented. For instance, the North Metropolitan Tramways Act, 1887, s. 8, makes special provision for the protection of the Whitechapel Board of Works in respect of Commercial Street. The defendants collect tolls on all carts wherever they are standing. No inquiry is made as to where the sale takes place. How can they be heard to say that the market is confined to High Street?

*Cur. adv. vult.*

July 10. SWINFEN EADY J. The plaintiffs are hay and straw salesmen in the Whitechapel Hay and Straw Market, commonly called the Hay Market, and the disputes between the parties are principally whether the hay market is limited to High Street, Whitechapel, or extends to any adjoining streets, and in particular to Commercial Street, Commercial Road, and Leman Street, and as to the validity of certain orders and directions for the regulation of the Whitechapel Hay Market made by the defendants in 1904. With a view of raising the legal questions involved in this action, the plaintiffs caused three vans to be placed in Leman Street, and the defendant council caused them to be removed to George Yard, whereupon the writ in this action was issued.

It is conceded that the market is an ancient market. The statute 11 Geo. 3, c. xv. (1770), contains a recital that there is due and has been accustomed to be received for every cart or waggon loaded with hay brought into the parish of St. Mary Matfellow, otherwise Whitechapel, and sold on the usual market days, the sum of sixpence, twopence whereof is due and of right belonging to the lord of the manor of Stebonheath, otherwise Stepney, as owner or proprietor of the market. This twopence is still payable to the present lord of the manor, as

(1) [1896] 1 Q. B. 604.

(2) (1889) 23 Q. B. D. 486.

admitted by the defence. But the parties are in dispute as to the limits of the market. The defendants deny that the market extends beyond High Street, and deny that it can lawfully be held in any parts of Commercial Street, Commercial Road, and Leman Street, which streets respectively adjoin High Street; they say that Commercial Street was constructed and Leman Street widened under statutory powers subsequent to 1840, and that Commercial Road was made under like powers subsequent to 1865; that no grant of any franchise can be produced; and that, as the title of the lord of the manor to the market is by prescription, the extent of the ancient user is the limit of the right, and that the ancient user cannot have extended to these new streets only recently constructed.

Occasionally on the grant of a franchise of a market it has been limited to some fixed place defined by metes and bounds, and containing an ascertained extent of land, as in the grant by King Charles II. to William, Earl of Bedford, of Covent Garden Market, where the grant was to hold a market in the parish of St. Paul, Covent Garden, in a certain place there called the Piazza, near the Church of St. Paul, extending from the church towards the east 420 feet, and from the garden wall of the Earl towards the north 316 feet: see *Prince v. Lewis*. (1) Usually, however, grants have been made of the right to hold a market in some manor, city, borough, parish, or other like district. "There is no doubt but that the grantee of such a market may hold it anywhere within that . . . district, or in more places than one, and may change the place in which it is held": see the opinion of the judges in *In re Islington Market Bill*. (2) In *Curwen v. Salkeld* (3) it was held that the grantee of a market might remove it to any place within the precinct of his grant, Lord Ellenborough C.J. stating that this was long ago settled in *Dixon v. Robinson* (4), and that the right of removal was incident to the grant if the lord of the market be not tied down to a particular spot by the terms of the grant.

The question then arises, Is the Whitechapel Hay Market limited by metes and bounds to the High Street? It was

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(1) (1826) 5 B. & C. 363, 365.

(2) (1835) 3 Cl. & F. 513, 518.

(3) 3 East, 538.

(4) (1686) 3 Mod. 108.

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decided by the Court of King's Bench in *De Rutzen v. Lloyd* (1) that the holding of a market upon a particular spot within the manor by the lords of that manor for a long series of years raised the presumption of the grant of a market to hold in any part of the manor, and not of a grant limited to the particular spot. In that case the plaintiffs down to 1832 had received tolls in respect of goods exposed for sale in and around an old market house, and they then erected a new market house in a different place, upon land of their own, within the town and manor. Two points were raised. The first point was whether it was necessary for the plaintiffs to produce a grant from the Crown authorizing the removal of the market; and secondly, if this was necessary, whether the plaintiffs had properly deduced their title to the subsequent charter, authorizing the market to be held anywhere within the manor. Lord Denman, in delivering the judgment of the Court, said: "Upon this state of facts the counsel for the defendant contended that, as all the evidence of possession down to 1832 applied to a perception of tolls in the old market house, and the places before used, the only inference of right thence to be drawn was of a right to hold the market there; and that it became necessary, in order to shew the market, in the place in which it was now held, to be legal, that a grant from the Crown should be produced authorizing the removal. A charter was accordingly produced, giving the right to hold the market anywhere within the manor, to which, according to the doctrine of *Curwen v. Salkeld* (2), the right of removal would be incident. But then it was contended that this would avail nothing to the plaintiffs, because they failed to connect themselves with it by a regular deduction of title. "Unless, however, the first of these points be correctly made, the second is immaterial; the question therefore will be, whether, from the evidence of a market immemorially held in certain places within a manor by the apparent lord of such manor, and those whom he represents as such, the necessary legal inference be that of a grant restrictively to hold it in such places only, and with no power of removal; or whether those facts are not premises from which a jury may properly infer a

(1) 5 A. & E. 456, 459.

(2) 3 East, 538.

grant of the market to be held in any convenient place within the manor, and, of course, with the power incident thereto of removal from time to time. If the latter be the proper answer to this question, the present finding of the jury may, as regards this point, be sustained. "The object of the inquiry would be to determine the extent and terms of the grant, the mere existence of which was already inferred from the user, all consideration of the charter actually produced, and of the defective title, being by the argument excluded. Now, in conducting this inquiry, the jury would properly consider the character of the grantee, the lord of a manor, the nature of the thing granted, a market, and its object, the grantee's profit, and the general convenience of the residents and the vicinage. Considering these, it appears to us the most reasonable conclusion of fact to be drawn, that the grant, whenever or by whomsoever made, had been of a market to be held generally, that is, at any convenient place within the manor. And if, upon the considerations just stated, that would be the reasonable conclusion to be drawn, we cannot see that it is necessary or even proper to infer a restriction upon the grant from the fact that the market appears always to have been held on any particular spot or spots within the manor. It is true that, where a grant is to be inferred from user alone, its extent as between the grantor and grantee is, in many instances, limited by the extent of the user, for it is not to be presumed against him that he has granted more than he appears to have permitted the grantee to enjoy. But, even in such cases, we think the jury would be warranted in finding a grant, including all such terms as are usual and reasonable incidents to a grant of the description inferred. In the present case, however, where the jury is called upon to determine, not merely the existence of a grant from the Crown, but the terms of the particular grant in question, we do not see how they can forbear to take into account every circumstance legitimately tending to affect the probabilities of the case; and if those circumstances point to wider limits than the mere user has extended to, but which are not inconsistent with such user, the jury may, indeed ought, to conclude in favour of such limits.

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“This reasoning will be found to be directly sanctioned by a well considered authority, the case of *Rex v. Cotterill*. (1) A material point there to be decided was, whether the corporation of Walsall had rightfully removed their market from the High Street, in which it had been holden immemorially, to a new market house. There, as here, no charter was produced, giving a market within any prescribed limits; but a charter of Ch. 2 granted ‘all and all manner of liberties, franchises, immunities, privileges, jurisdictions, markets, and hereditaments, which the mayor and commonalty now hold, use, and enjoy, or have held,’ &c. What then was the market enjoyed at the date of the charter—a market to be held in the High Street, and so irremovable from it, or one to be held within the borough, and so removeable to any convenient spot within it? That was the question—which, in terms, the charter threw no light upon; and it was argued, as here, that the user alone was to determine it. The Court, however, held the other way, the different members attaching different degrees of weight to particular circumstances, but all agreeing in the principle that all the circumstances were to be taken into account, and no limits to be implied but such as might fairly be deduced as probable inferences from all those circumstances. In that case some reliance is placed by the judges on the fact, that the grantee of the supposed charter was a corporation and not an individual: that, however, was a fact only increasing the probability of a grant co-extensive with the borough: we are now only considering whether there was any evidence of a grant co-extensive with the manor: it is unnecessary, therefore, to observe that Abbott J. seems to consider that an equal probability exists of a grant to the lord being co-extensive with the manor, as of a grant to a corporation being co-extensive with the borough. We entirely agree with this case; and we think that the learned judge not only was not called upon to nonsuit the plaintiffs, but, upon this evidence, and as to this point, would have been justified in directing the jury that, if they were satisfied of the existence of the grant, it was most probably a grant to be exercised anywhere *infra manerium*. It becomes, therefore, unnecessary to consider the second point.”

(1) (1817) 1 B. & Ald. 67.

See also *Attorney-General v. Horner* (1), where it was held by the Court of Appeal and the House of Lords that a market granted without metes and bounds may extend from time to time as the crowded state of the market may require.

Now, what are the facts in the present case? In the Act of 1770, 11 Geo. 3, c. xv., intituled "An Act for the better paving that part of the High Street, . . . Whitechapel, which lies in the county of Middlesex, and for removing obstructions and annoyances therein," power is given to the Commissioners to make a rate for defraying the charges and expenses upon all persons occupying any house, shop, warehouse, or tenement within the High Street, not to exceed in any year 1s. 6d. in the pound, with a proviso that no person should be liable to pay more than five-sixth parts of such rate, in respect of any house, shop, warehouse, or other tenement situate on the south side of the said street between Red Lion Street (now Leman Street) and the Liberty of the City of London; and that the same occupiers were thereby absolutely acquitted and discharged from every claim in respect of the appropriation of any tolls on hay theretofore received by them. This statutory provision tends to shew that, at the date of the Act, the hay market did not usually extend along High Street further east than Leman Street.

This Act was repealed by the Whitechapel Improvement Act, 1853 (16 & 17 Vict. c. cxli.). Trustees were appointed for carrying the last-mentioned Act into execution, and by ss. 43 and 44 they were empowered to receive and collect the market tolls, and after paying thereout to the lord of the manor of Stepney, as the owner or proprietor of the said market, the sum of twopence clear of all charges and expenses for every cart or waggon loaded with hay sold or exposed for sale on market days, the balance, less expenses, was to be divided into two equal parts, and one of such parts applied in reduction of the amount of the paving rate assessed upon the occupiers of rateable property in High Street, and the other part applied for the use of the parish generally in aid of the paving rate. This provision, together with that contained in s. 46 of the Act, tends to shew that at the date of this Act the market had increased and extended generally along

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High Street, and was not held only in the portion to the west of Leman or Red Lion Street.

By the year 1878 questions had arisen with regard to the obstruction to traffic caused by the market, and the board of works for the Whitechapel district (the predecessors of the defendants) appointed a committee to consider that question, and also to consider a memorial presented by the vestry of Mile End Old Town to the Metropolitan Board of Works for the removal of such market. This committee reported in March, 1878, as follows: "That a considerable space of important streets is occupied for the purposes of the market on Tuesdays, Thursdays, and Saturdays in every week is a matter which is beyond dispute.

"From the plans which have been prepared, and from inspection made by the surveyor, it appears that the hay and straw carts, and waggons, on market days, are placed upon portions of the following streets: Whitechapel High Street, Commercial Street, Leman Street, and the new street called Commercial Road.

"The positions occupied for the market in Whitechapel High Street are in the centre of that street, extending along the greater part of its length, a space of between 90 and 100 feet being at all times kept clear for the traffic into Whitechapel High Street from Commercial Street, Commercial Road, and Leman Street. The extent available for the general traffic throughout this street, on market days, is 41 feet: namely, upon the south side 24 feet, and upon the north side 17 feet.

"In Commercial Street, the occupied space in the centre of the street extends for 340 feet, and the space kept clear for the general traffic is 32 feet: namely, 16 feet on each side.

"In Leman Street, the occupied space is the centre of the street, extending for 290 feet, and the space kept clear for the general traffic is 26 feet; namely, 13 feet on each side.

"In Commercial Road, the occupied space is the centre of the street, extending 520 feet, and the space kept clear for the general traffic is 34 feet; namely, 17 feet on each side."

It is admitted by the defendants that, with reference to the collection by them of market tolls, the salesmen render accounts

of hay sold and tolls payable, and that these accounts include all carts wherever standing, and are not confined to carts standing in the High Street, but the accounts do not shew the position in which the carts were respectively standing. There are also various modern Acts of Parliament, containing provisions for the protection of the Whitechapel Hay Market. By the North Metropolitan Tramways Act, 1870, s. 5, provision is made with regard to the tramways along High Street, Whitechapel, that they are not to be made in the lines shewn on the deposited plans, but only in a particular direction, which is an unusual position, and manifestly for the benefit of the market, and also that in the construction, maintenance, and repair of the tramways there is to be no interference with the carrying on of the hay and straw market. By the North Metropolitan Tramways Act, 1871, ss. 21 and 28, there are similar provisions with regard to Commercial Road. By the North Metropolitan Tramways Act, 1887, s. 9, there are provisions for the protection of the market, and the tramway, No. 4, in Commercial Street, is to be constructed in a particular manner, and on certain days and between certain hours one line of rails only is to be available for the tramways going in both directions, and the hay and straw salesmen are to be entitled, as against the tramway company, to occupy the site of the other line of tramway in Commercial Street with their horses, carts, and waggons, without let or hindrance by the tramway company. There is also a similar provision as regards the tramways in Leman Street, contained in s. 10 of the North Metropolitan Tramways Order, 1888, confirmed by the Act of 1888.

There was also direct evidence of actual user of Commercial Street, Leman Street, and Commercial Road as part of the market. Uriah Harvey, a retired police sergeant, was appointed to the police force at Leman Street in 1854, and was familiar with the neighbourhood, and in 1879 was appointed market regulator by the Whitechapel Board of Works. He spoke to the market having grown very much since he first remembered it and to placing the market carts in all the three streets in dispute. Indeed, he spoke to some carts standing in Leman Street as far back as 1864, but he was not quite sure about the date. The plaintiffs' firm has been in existence over 100 years, and their

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managing director spoke, of his personal knowledge, of the market between 1875 and 1888 occupying High Street, Commercial Street to St. Jude's Church, the Commercial Road to Church Lane, and Leman Street to Alie Street. Moreover, previous to the market regulations made in the year 1904 there is no evidence whatever of any interference by the defendants, either as highway authority or as market regulators, with carts and waggons standing in any of the streets before mentioned.

What is the proper inference to be drawn from these facts and documents? It is that the Whitechapel Market is a market without metes and bounds and may extend from time to time as the exigencies of the market may require, and that the streets adjoining High Street, including Commercial Street, Commercial Road, and the widened Leman or Red Lion Street must be presumed to have been dedicated to the public subject to the exercise of the market franchise. This position is recognized by s. 46 of the Whitechapel Improvement Act, 1853, which enables the surveyor of the trustees, to prevent the traffic along High Street from being impeded by too many carts and waggons, to direct them to stand in other streets adjoining. The result is that, in my opinion, the plaintiffs' waggons were lawfully standing in Leman Street, and were unlawfully seized and removed by the defendants.

The other point raised was as to the validity of the market regulations. In my opinion they are invalid, and this question was not seriously disputed by the defendants. Sect. 46 enables the surveyor of the trustees from time to time upon every occasion on which the thoroughfare of the High Street is impeded by the market carts and waggons standing there, to direct them to be placed and stand in the adjoining streets and places, but it does not enable the defendants to make beforehand regulations excluding these carts and waggons from the adjoining streets, in which they have heretofore stood, and requiring them to stand in certain by-streets, Buckle Street, Colchester Street, and Plough Street, which do not adjoin the High Street. With regard to the circumstances of the particular seizure complained of herein, it is not necessary to

examine in detail what the condition of the market in the High Street was when the vans were seized, as both sides have joined in desiring a decision of their legal rights, and have dealt with the action on this footing; but, in point of fact, the market in the High Street was full when the seizure was made, although ten minutes afterwards there was standing room in the High Street for the three vans in question. It was urged that the High Street could not be considered full, as there was a gap in the carts opposite the entrance to the plaintiffs' premises, but, in my opinion, this space was necessary, not only for the convenient ingress and egress to and from the plaintiffs' premises, but also as a safe stand for the salesmen and buyers having business in the market, who could not transact the market business without it, as they could not stand in the line of traffic without obstructing such traffic, or without danger to themselves. The plaintiffs have only suffered nominal damage by the removal of their vans, and they do not claim any money payment in respect thereof. There will, therefore, be a declaration in accordance with paragraphs 3 and 4 of the amended statement of claim. The defendants must pay the costs of the action.

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Solicitors: *Baddeleys & Co.; Samuel Chester.*

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*Adulteration—Importation of Butter—Admixture with Foreign Fat—Package not conspicuously marked—Application of Warrant to Importation—Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 25—Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), ss. 1, 20, sub-ss. 1, 2, 3.*

Where a defendant is charged under s. 1, sub-s. 1 (*b*), of the Sale of Food and Drugs Act, 1899, with importing into the United Kingdom adulterated butter in packages not conspicuously marked with a name or description indicating that the butter has been so treated, the fact that he received from the foreign vendor a written warranty of the purity of the butter under circumstances which comply with the provisions of s. 25 of the Sale of Food and Drugs Act, 1875, and s. 20, sub-ss. 1 and 3, of the Sale of Food and Drugs Act, 1899, affords no defence, inasmuch as the written warranty so received only constitutes a defence to a charge of selling adulterated goods in the United Kingdom, and not to a prosecution for importing into the United Kingdom goods in packages insufficiently marked.

CASE stated by an alderman of the City of London.

An information was preferred by the appellant Kelly, an officer of customs, against the respondents J. and J. Lonsdale & Co., Limited, for that the respondents, who were a company incorporated under the Companies Acts, 1862 to 1900, having its registered office at 17, Stanley Street, in the City of Liverpool, did on August 28, 1905, import into the United Kingdom per the steamship *Batavier V.* from Rotterdam, at Custom House and Wool Quay, in the City of London, and within the limits of the Port of London, certain butter contained in 127 packages marked "H. 127," which butter was, upon examination of a sample thereof, found to be adulterated, to wit, by the admixture therewith of foreign fat, and which packages containing the butter were not conspicuously marked, as required by s. 1 of the Sale of Food and Drugs Act, 1899 (1), with a name

(1) Sale of Food and Drugs Act, 1899, s. 1, sub-s. 1: "If there is imported into the United Kingdom any of the following articles,

namely:— . . . (*b*) adulterated or impoverished butter (other than margarine) or adulterated or impoverished milk or cream, except in packages

and description indicating that the butter had been so treated, contrary to the form of the statutes in that case made and provided.

Upon the hearing of the information the following facts were proved or admitted :—

(a) That on the date and at the place laid in the information 127 cases or packages of butter treated as hereinafter

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or cans conspicuously marked with a name or description indicating that the butter or milk or cream has been so treated; . . . the importer shall be liable, on summary conviction, for the first offence to a fine not exceeding twenty pounds, for the second offence to a fine not exceeding fifty pounds, and for any subsequent offence to a fine not exceeding one hundred pounds."

Sub-s. 2: "The word 'importer' shall include any person who, whether as owner, consignor, or consignee, agent, or broker, is in possession of, or in anywise entitled to the custody or control of, the article; prosecutions for offences under this section shall be undertaken by the Commissioners of Customs; and subject to the provisions of this Act this section shall have effect as if it were part of the Customs Consolidation Act, 1876."

Sect. 20, sub-s. 1: "A warranty or invoice shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts unless the defendant has, within seven days after service of the summons, sent to the purchaser a copy of such warranty or invoice with a written notice stating that he intends to rely on the warranty or invoice, and specifying the name and address of the person from whom he received it, and has also sent a like notice of his

intention to such person."

Sub-s. 2: "The person by whom such warranty or invoice is alleged to have been given shall be entitled to appear at the hearing and to give evidence, and the Court may, if it thinks fit, adjourn the hearing to enable him to do so."

Sub-s. 3: "A warranty or invoice given by a person resident outside the United Kingdom shall not be available as a defence to any proceeding under the Sale of Food and Drugs Acts, unless the defendant proves that he had taken reasonable steps to ascertain and did in fact believe in the accuracy of the statement contained in the warranty or invoice."

Sect. 25: "In this Act, unless the context otherwise requires— . . . Other expressions have the same meaning as in the Sale of Food and Drugs Acts, and an offence under this Act shall be treated as an offence under those Acts."

Sect. 28, sub-s. 1: "This Act may be cited as the Sale of Food and Drugs Act, 1899, and the Sale of Food and Drugs Act, 1875, and the Sale of Food and Drugs Act Amendment Act, 1879, and the Margarine Act, 1887, and this Act may be cited collectively as the Sale of Food and Drugs Acts, 1875 to 1899, and are in this Act referred to as the Sale of Food and Drugs Acts."



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mentioned were imported into the United Kingdom, and that such cases or packages were not conspicuously, or at all, marked with any name or description indicating that the butter had been so treated.

(b) That the butter had been treated by the admixture therewith of fat other than butter fat to the extent of not less than 15 per cent., and was therefore adulterated butter.

(c) That the respondents were the "importers" of such butter within the meaning of s. 1 of the Sale of Food and Drugs Act, 1899.

(d) That the requirements of sub-s. 4 of that section had been duly complied with by the Commissioners of Customs, and that the fact of the adulteration aforesaid had been duly established by analysis, certified by the principal chemist.

The respondents received a written contract from Nicholls Brothers, the London agents of H. J. Nederveen, the Dutch merchant from whom the respondents bought the butter, of which the following is the material part:—

"10, Colonial House, Tooley Street,

"London, S.E., August 16, 1905.

"Nicholls Bros., Provision Brokers.

"Messrs J. and J. Lonsdale & Co., Ltd.

"We have this day sold you the following goods (agreeably with the rules of the Home and Foreign Produce Exchange, Limited), 800 (say eight hundred) casks Dutch Control Unsalted Creamery Butter, at 107s. (say one hundred and seven shillings) nett ex Cold Stores, Amsterdam, through sellers' bankers against delivery order, &c.

"Mr. H. J. Nederveen,

"'s Hertogenbosch, Holland.

"Yours truly,

"per pro. Nicholls Bros.,

"F. W. Nicholls."

The respondents also received from H. J. Nederveen an invoice, which (so far as material) was as follows:—

"Holland, August 19, 1905.

"Messrs. J. and J. Lonsdale & Co., Ltd.,

"Tooley Street, London, S.E.,

"Bought of H. J. Nederveen,

"Butter Merchant,

"800 Pks. Genuine Cream-Butter."

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"Guaranteed pure  
butter, warranted pure  
butter, and not con-  
taining more than  
16 % of moisture.

"(Sgd.) H. J. Nederveen."

H. J. Nederveen, whose name appeared on the documents, was a person resident outside the United Kingdom. Nicholls Brothers carried on business and resided within the United Kingdom.

The respondents relied upon a defence of warranty under the Sale of Food and Drugs Act, 1875, s. 25 (1), and the Sale of Food and Drugs Act, 1899, s. 20, sub-ss. 1, 2, and 3.

The respondents contended that the documents set out above were written warranties within the meaning of s. 25 of the Sale of Food and Drugs Act, 1875, and s. 20 of the Sale of Food and Drugs Act, 1899; that the taking of the sample by the Commissioners of Customs was in effect a purchase within the meaning of the Acts, and that the respondents had purchased and imported the butter with written warranties within the meaning of s. 25 of the Act of 1875, and of s. 20 of the Act of 1899; and that, having regard to the concluding words of s. 25 of the latter Act, an

(1) Sale of Food and Drugs Act, 1875, s. 25: "If the defendant in any prosecution under this Act prove to the satisfaction of the justices or Court that he had purchased the article in question as the same in nature, substance, and quality as that demanded of him by the prosecutor,

and with a written warranty to that effect, that he had no reason to believe at the time when he sold it that the article was otherwise, and that he sold it in the same state as when he purchased it, he shall be discharged from the prosecution . . . ."

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importer who has purchased the imported article with a warranty of purity, is entitled to be discharged from a prosecution under s. 1 of the Act of 1899, and that the respondents had no reason to believe that the butter was otherwise than as described in the warranties, and that they had taken reasonable steps to ascertain, and did, in fact, believe in the accuracy of the statement contained in the warranties.

The appellant contended that the defence of a warranty did not apply to prosecutions under s. 1 of the Act of 1899; that the defence of warranty applied only to the offence of selling adulterated goods and not to the offence of importing goods insufficiently or improperly marked; that the concluding words of s. 25 of the Act of 1899 did not apply to a prosecution or charge, but to an offence, and probably referred to s. 17 of that Act; and that in any case there was no evidence on which the alderman could find that the respondents had taken reasonable or any steps to ascertain the accuracy of the statement contained in the warranty.

The alderman found that the requirements of sub-s. 1 of s. 20 of the Act of 1899 had been complied with by the respondents, and the appellant, for the purposes of this case, accepted that finding. The alderman also found as a fact that the respondents had no reason to believe that the butter was otherwise than as described in the warranties delivered to the respondents by Nederveen's agents, Messrs. Nicholls, in the United Kingdom, and had taken reasonable steps to ascertain the accuracy of the statements contained in the warranties, and he held that the respondents were by reason of the warranties entitled to be discharged from the prosecution. He accordingly dismissed the information.

The question for the opinion of the Court was whether the alderman, upon the above statement of facts, came to a correct determination in point of law.

*Sir John Lawson Walton, A.-G., and F. F. Daldy, for the appellant.* The intention of the Legislature was to make the person who imports the adulterated butter take the risk. It was not intended that he should escape responsibility by producing a warranty given by the foreign vendor who cannot

be reached by proceedings taken in the United Kingdom. In the present case no charge is made against the bona fides of the respondents. The public cannot be protected except by the risk of prosecution being thrown on the importer. Sect. 25 of the Sale of Food and Drugs Act, 1875, does not apply. It is in terms confined to the case where there has been a sale upon the home market and the warranty has been given by the vendor to the purchaser who buys upon the home market: *Elliot v. Pilcher*. (1) The words "treated as an offence" in s. 25 of the Act of 1899 do not mean that there is to be the same defence to a prosecution under the Act of 1899 as there is to proceedings taken under the Sale of Food and Drugs Acts. An offence under s. 1, sub-s. 1 (b), of the Act of 1899 consists in importing the adulterated or impoverished butter unmarked or untruly marked. Sect. 1, sub-s. 2, of the Act of 1899 shews that the statute is dealing with matters distinct from a sale, for by virtue of that subsection a broker is liable to prosecution, although he is not the purchaser. The intention is that if a person is a party to the importation of a deleterious article he is to be responsible. The legislation is only to be explained by the extreme anxiety of Parliament to protect the public. It is clear that the defence of a written warranty from the foreign vendor would not avail a broker. It would be inapplicable, for the broker is not a buyer. That consideration shews that the defence is not available to any person upon a charge under s. 1 of the Act of 1899 of importing articles insufficiently marked.

*H. Avory, K.C., F. M. Abrahams, and W. S. Kennedy*, for the respondents. The contention on behalf of the appellant involves the proposition that a merchant in London who enters into a contract to be supplied with pure butter, and who receives the invoice from the foreign vendor, is an importer within the meaning of s. 1 of the Sale of Food and Drugs Act, 1899, and, without an opportunity of inspection of the goods sent to him, may be convicted of a criminal offence if the person from whom he buys sends him something which is different from the article he buys. Suppose a person bought pork, and dogs were sent to him, he could not be said to be an importer of dogs. A person does not import a

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(1) [1901] 2 K. B. 817.



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thing which is different from that which he contracts to buy merely because the vendor chooses to send a different thing. Sect. 20, sub-s. 3, of the Act of 1899 expressly recognizes that there may be a warranty given by a foreign vendor which would be a defence. The butter was mixed with fat other than butter fat to the extent of not less than 15 per cent., and was, having regard to the definition contained in s. 3 of the Margarine Act, 1887 (50 & 51 Vict. c. 29), margarine. The respondents ought, therefore, to have been charged under s. 1, sub-s. 1 (a), of the Act of 1899 with importing margarine. Had that been done, the written warranty would have been a complete defence by virtue of s. 8 of the Act of 1899, which allows a defendant charged with that offence to set up the defence of the written warranty given by s. 7 of the Margarine Act, 1887. That shews that the defence of a written warranty is recognized by the Act of 1899.

RIDLEY J. We are all of opinion that the defence set up, and upon which the magistrate dismissed the information, was not a good one. The charge was for importing adulterated butter in packages insufficiently marked. The charge was treated by the alderman as one for importing adulterated butter, and it is upon that basis that we have arrived at the conclusion that the defence of a written warranty given by the foreign merchant is bad. It may be that there is some ground for contending that the substance was not butter but margarine, but as to that question we may have the opportunity of further consideration hereafter. For the purposes of the present case it is to be treated, not as margarine, but as butter with a certain percentage of fat in it, and therefore adulterated butter, and not margarine within the meaning of the statutes. That being so, we have to answer this question: In such a case as this, is the "warranty defence"—if I may so call it—given by s. 25 of the Sale of Food and Drugs Act, 1875, a competent defence to a prosecution instituted under s. 1 of the Sale of Food and Drugs Act, 1899?

In order to establish that defence it would be necessary to shew that s. 25 of the Act of 1875, which is repeated by s. 12 of the Margarine Act, 1887, is incorporated by the Act of 1899. The effect of those sections is that in prosecutions for the sale

of adulterated articles it is competent for the defendant to shew that he purchased the article with a written warranty that it was the same in substance and quality as was demanded of him, and that he had no reason to believe the contrary at the time when he sold it. I am of opinion that there ought to be very strong words in the Act of 1899, which deals with importation, to justify us in holding that that warranty defence will apply when there has been no sale and no purchase by the person who is the subject of the prosecution. It is necessary, in order to justify us in holding that sections contained in one statute are incorporated into another, that we should see clearly that they are meant so to apply. If the Act of 1899 contained a provision that in respect of all prosecutions for importing goods under s. 1 thereof the same defence as is given under s. 25 of the Act of 1875 should apply, the case would assume a different complexion, but I find in respect of the importation of adulterated butter no such provision in the Act of 1899. Reliance has been placed upon s. 20, sub-s. 3, of the Act, but it appears to me that that section has reference only to the case of a person who sells and who therefore comes under the Sale of Food and Drugs Act, 1875, and who has a foreign warranty and therefore comes within s. 25 of the Act of 1875. Sub-s. 3 of s. 20 of the Act of 1899 provides, presumably in reference to some instances which have arisen, that if he relies upon a foreign warranty he must shew that he had taken reasonable steps to ascertain and did in fact believe, the accuracy of the statement contained in the warranty or invoice. I am not sure that I have the concurrence of my learned brothers in the remark I am about to make, viz., that I do not think that the words "under the Sale of Food and Drugs Acts" in that sub-section necessarily include the Sale of Food and Drugs Act, 1899. There is this difficulty, viz., that it is obvious that the same expression in s. 25 does not include the Act of 1899, because it says that "the expression 'local authority' means any local authority authorized to appoint an analyst for the purposes of the Sale of Food and Drugs Acts," not "this Act." It also contains the provision that "Other expressions have the same meaning as in the Sale of Food and Drugs Acts." That provision does not

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mean that other expressions have the same meaning as in the Act of 1899, but the same meaning as in the Sale of Food and Drugs Acts, treating them as independent of the Act of 1899. I think the same meaning must be given to the expression "Sale of Food and Drugs Acts" in s. 26 of the Act of 1899. Again, the former Sale of Food and Drugs Acts are not incorporated with the Act of 1899 by s. 28 of that Act, as they would have been if incorporation had been intended; but provision is made for their citation with the Act of 1899 collectively as the Sale of Food and Drugs Acts, and they "are in this Act referred to as the Sale of Food and Drugs Acts." In that section it is observable that the phrase "Sale of Food and Drugs Acts" does include the Act of 1899, whereas in s. 25 it seems to me that it does not. Therefore it is not easy to assume that in s. 20, sub-s. 3, of the Act of 1899 that expression which is used in two senses in the Act has the wider meaning.

With regard to the words in s. 25 of the Act of 1899, "and an offence under this Act shall be treated as an offence under those Acts." If the view my brother Darling and I took in *Rex v. Monsted* (1) is right, this is an a fortiori case, for it is even more difficult in this case than it was in *Rex v. Monsted* (1) to make the words apply. They are extremely inapt, if I may repeat the expression I used in *Rex v. Monsted* (1), because you cannot treat this offence as one under those Acts, when, as I have been pointing out, the offence under those Acts is quite a different one from that dealt with in this Act. The warranty in the Act of 1875 is applied to a case which does not exist under the Act of 1899. In the case of importation there is no sale by the person who is the subject of the prosecution. That fact makes it, to my mind, extremely difficult to interpret those words as meaning that the Act of 1899 and the former Acts are to be read together. I do not think it is possible to so interpret the words without violating the ordinary rules of construction. It would be necessary to strike out some words and insert others in sections of the former statutes, which were passed with a different object from that of the Act of 1899.

With regard to s. 8 of the Act of 1899, I incline to the opinion

(1) [1906] ante, p. 456.

(though I am doubtful as to the reason why it should be so) that that section supplies, in respect of margarine, in a large measure the deficiencies of the statute in respect of other matters, because it says that any defence which would be a defence under s. 7 of the Margarine Act, 1887, "shall be a defence under this section." Provision is therefore made, not only for a defence within the Margarine Act, 1887, but also for a defence to a prosecution under s. 8 of the Act of 1899. If similar words existed applying to the present case I should have thought it would have been very much more difficult to say that the written warranty is not a good defence; but it appears to me that for some reason margarine is placed by this statute in a different position from the other articles which are the subject of importation.

However, it is not necessary to decide that point now. What I intend to decide is that in a prosecution for importing adulterated butter in packages insufficiently marked the defence of a foreign warranty is not a good one.

DARLING J. I am of the same opinion. We must take it that the respondents were charged with having imported adulterated butter, which is an offence under s. 1 of the Sale of Food and Drugs Act, 1899, that butter not being in packages marked as provided for by the statute. It therefore seems to me that we are not to consider what would be the case if they were charged with importing, not adulterated butter, but margarine. Probably in that case totally different considerations would arise, and defences might be open to them which are not open to them now. Having been charged with importing adulterated butter, the respondents successfully set up as a defence before the alderman s. 25 of the Sale of Food and Drugs Act, 1875. Under that section the defendant has to do two things—(1.) to prove that he purchased it with a written warranty; (2.) that he sold it in the same state. In the present case the respondents desire to set up that section as a defence in a case where they did not sell at all. They are charged under s. 1 of the Sale of Food and Drugs Act, 1899, with importing adulterated butter in packages insufficiently marked. Sub-s. 3 of that section gives the Commissioners of Customs power to take

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such samples as may be necessary for the enforcement of the previous provisions of the section. It therefore seems to me that in order to make out this defence they must induce us to hold either that the words "that he sold it," which are a necessary part of the defence under s. 25 of the Act of 1875, are now to be read as though they were "that he imported it," or that when the sample was taken by the Commissioners of Customs it was then a sale to them and that the butter was in the state in which the respondents purchased it. It seems to me that we cannot do that. Possibly, had the Legislature foreseen what would be the result of simply incorporating the warranty defence in certain cases, they would have re-enacted s. 25 of the Act of 1875 with some words which would make it applicable to all cases, including the present one; but they have not done so, and I do not think we have authority to say that something which can only be a defence in a case where there has been a sale shall be a defence where there has been no sale, but where the officers of one of the public departments, acting under compulsory powers, have taken samples. With regard to the provisions contained in s. 20, sub-s. 3, of the Act of 1899, I do not think that they are sufficient to enable the respondents to succeed. In my opinion they apply where there has been a sale by the defendant of that which he has bought abroad with a warranty, and sold to somebody in this country. If he has done that he will be brought within the protection of s. 25 of the Act of 1875. But if he has not sold the article, but it has been taken by the customs-house officers as a sample, then from the very nature of the language used in s. 25 of the Act of 1875 he cannot make out the defence which the respondents now attempt to set up.

With regard to s. 8 of the Act of 1899, which relates to margarine, it may be that if the respondents had here been charged with importing margarine instead of adulterated butter, they might have made out a defence by proving the facts they have established in the present case; but I wish to carefully guard myself from saying that I think they would have done so, because (although I do not care to consider the Margarine Act, 1887, when it is unnecessary to do so) in my opinion it by no

means follows from the provisions contained in s. 8 of the Act of 1899 that any defence which would be good if there were a prosecution under the Act of 1887 would also be valid in cases covered by s. 8 of the Act of 1899, nor that the respondents, by availing themselves of s. 25 of the Act of 1875, would be able to successfully dispose of this prosecution if the charge in the summons had been for importing margarine instead of adulterated butter. That case may come before us some day, and I do not desire to say a single word to prejudice the determination of it should that arise, because it is necessary to go very carefully into a number of statutes before giving an opinion that is worth anything on a point arising under the Sale of Food and Drugs Acts.

Although in my opinion the fact that the respondents had complied with s. 20, sub-s. 3, of the Act of 1899 was not open to them as a defence to the summons, yet it seems to me very proper in any case that the fact should be gone into, for the reason that it has a very great bearing upon the amount of the penalty to be imposed. Such circumstances as were proved in this case would, in my opinion, result in a very mitigated form of the possible punishment being inflicted, although, as I have said, I do not think they amount to a complete defence to the charge.

BRAY J. I am of the same opinion. The respondents are charged with having imported adulterated butter without conspicuously marking the proper name and description on the packages, and one of the defences which they set up (to which, as I understand, the alderman yielded) is that there was a warranty within s. 25 of the Sale of Food and Drugs Act, 1875. In answer to that the appellant contends that the defence of warranty applies only to the offence of selling adulterated goods, and not to that of importing goods insufficiently or improperly marked. That is the only point with which, it seems to me, we have to deal.

In order to shew that s. 25 of the Act of 1875 applies, the respondents have to shew something in the Act of 1899 which makes that section applicable. Sect. 8 of the Act of 1899 in

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my opinion does not help the respondents, because they were not charged with an offence under that section. It may be that this was not adulterated butter, but margarine, in which case the prosecution might fail; but that defence the respondents must set up before the alderman when it is remitted to and heard by him. With regard to s. 20, sub-s. 3, of the Act of 1899, which was relied upon by the respondents, in my opinion this was a "proceeding under the Sale of Food and Drugs Acts," because it is provided by s. 28, sub-s. 1, that all those Acts, including the Act of 1899, "are in this Act referred to as the Sale of Food and Drugs Acts," and I do not think the fact that in s. 25 that cannot be the meaning of "the Sale of Food and Drugs Acts" is a sufficient answer, because, although it is quite true, the explanation is that in that section the context "otherwise requires."

So far I am with the respondents, but the provision in s. 20, sub-s. 3, that a warranty or invoice shall not be available as a defence unless the defendant proves that he took certain steps, is not equivalent to an enactment that it shall be available as a defence if the defendant does prove that he took those steps. I have no doubt that the draftsman of that section had the idea that it would have that effect, but there is no express enactment that it shall; and therefore I do not think that this sub-section has the effect of incorporating s. 25 of the Act of 1875. But s. 25 of the Act of 1899, which provides that "an offence under this Act shall be treated as an offence under those Acts," was also relied upon on behalf of the respondents as enacting in effect that every defence under those Acts constitutes a defence under this Act. In my opinion that argument cannot be maintained after the decision which we gave in *Rex v. Monsted*. (1) The real principle, as I understand it, of the decision in that case was that those words do not mean that the proceedings which regulate prosecutions under the former Acts are to regulate prosecutions under s. 1 of the Act of 1899, and, that being so, it seems to me that we cannot treat s. 25 of the Act of 1875 as being made applicable to a prosecution under this Act.

I do not think it is necessary to say what my opinion would be as to s. 25 of the Act of 1875—whether it could be used as a

(1) [1906] ante, p. 456.

defence if it were incorporated—because, in my opinion, having regard to our construction of s. 25 of the Act of 1899 in *Rex v. Monsted* (1), s. 25 of the Act of 1875 is not incorporated, and therefore I need not consider it.

I express no opinion on the question whether under the particular circumstances the respondents can be said to have imported this butter. I do not think the point is open to them upon the present occasion, but it is a point which they can raise before the alderman when the case comes before him again, and I only mention it in order to shew that it will then be open to them.

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 Bray J.

*Case remitted.*

Solicitor for the appellant: *Solicitor of Customs.*

Solicitors for the respondents: *Nunn, Popham & Starkie.*

J. E. A.

[IN THE COURT OF APPEAL.]

AUSTIN FRIARS STEAMSHIP COMPANY v. STRACK.

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 July 13,

*Practice—Appeal to Court of Appeal—Time for Appealing—Final Order in Matter not being Action—Order LVIII., r. 15.*

An order of a Divisional Court affirming an order of an alderman of the City of London made upon a summons for wages taken out by a seaman under s. 164 of the Merchant Shipping Act, 1894, is a final order in a matter not being an action within the meaning of Order LVIII., r. 15, and no appeal can be brought to the Court of Appeal after the expiration of fourteen days from the decision of the Divisional Court.

APPEAL from an order of the Divisional Court (2) (made upon a case stated by an alderman of the City of London) affirming an order made by the alderman upon a summons for wages taken out by the respondent Strack, a seaman, under s. 164 of the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60).

The order by the alderman was made on September 17, 1904.

On May 29, 1905, the Divisional Court, upon a case stated by the alderman, affirmed the order of September 17, 1904.

(1) [1906] ante, p. 456.

(2) [1905] 2 K. B. 315.



C. A. 1906 <hr/> AUSTIN FRIARS STEAMSHIP COMPANY v. STRACK.	At the hearing before the Divisional Court on May 29, 1905, leave to appeal was not asked for, but on July 31, 1905, upon an application on behalf of the appellants, the Divisional Court granted leave to appeal, no application for an extension of time for appealing being made. Notice of appeal to the Court of Appeal was given on August 9, 1905.
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*S. T. Evans, K.C.*, and *J. H. W. Pilcher*, for the respondent. There is a preliminary objection to this appeal being heard. The notice of appeal to the Court of Appeal was given too late. The order of the Divisional Court was a final order in a matter not being an action within the meaning of Order LVIII., r. 15, which provides that "No appeal to the Court of Appeal from any interlocutory order, or from any order, whether final or interlocutory, in any matter not being an action, shall, except by special leave of the Court of Appeal, be brought after the expiration of fourteen days, and no other appeal shall, except by such leave, be brought after the expiration of three months." Action is defined in s. 100 of the Judicature Act, 1873, as "a civil proceeding commenced by writ, or in such other manner as may be prescribed by Rules of Court; and shall not include a criminal proceeding by the Crown." Notice of appeal to this Court ought to have been given before the expiration of fourteen days from the decision of the Divisional Court: *Onslow v. Commissioners of Inland Revenue*. (1) Order LVIII., r. 15 shews that the Divisional Court had no power to give the leave to appeal as the fourteen days from their decision had expired, but it is not wished to rely upon that point. The objection is that the notice of appeal to this Court was too late.

*Scrutton, K.C.*, and *Dawson Miller*, for the appellants. So far as this Court is concerned, this is a "civil proceeding commenced" in the High Court "in such other manner as may be prescribed by Rules of Court" within the meaning of s. 100 of the Judicature Act, 1873. It is admitted that there is no authority in support of that proposition. If it is unsound the Court is asked to extend the time for appealing under Order LVIII., r. 15.

LORD ALVERSTONE C.J. In the absence of authority to the contrary, I am of opinion that the point is unarguable, and that the appeal is too late. The order of the Divisional Court is a final order in a matter not being an action. In the absence of special circumstances this Court ought not to extend the time.

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SIR GORELL BARNES and FARWELL L.J. concurred.

*Appeal dismissed.*

Solicitors for appellants: *Botterell & Roche.*

Solicitors for respondent: *Pattinson & Brewer.*

J. E. A.

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[IN THE COURT OF APPEAL.]

THE KING v. WOODHOUSE AND OTHERS

(JUSTICES OF LEEDS).

C. A.

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May 4, 7, 10,  
11, 29, 31.

*Licensing Acts—Certiorari—Licensing Justices—Bias on part of Justices—Qualification of Applicant for Licence—Person keeping or about to keep Alehouse—Beerhouse—Real resident Holder and Occupier—Practice—Costs of Application for Certiorari—Licensing Act, 1904 (4 Edw. 7 c. 23), s. 1; Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 1; Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 1.*

A certiorari will lie to bring up an order made by licensing justices under the Licensing Act, 1904, s. 1, sub-s. 2, referring an application for renewal of a licence to quarter sessions.

*Reg. v. Sharman*, [1898] 1 Q. B. 578, on this point, not followed.

Where, upon applications for the renewal of the licences of certain licensed premises at the general annual licensing meeting, licensing justices, acting in accordance with an arrangement previously made with the owners of the premises, and without judicial consideration of objections made to the renewal of the licences, granted provisional licences to the applicants and referred the applications to the quarter sessions under s. 1 of the Licensing Act, 1904 :—

*Held*, that the Court should grant a writ of certiorari to bring up and quash the licences so granted and the orders referring the applications to the quarter sessions and a writ of mandamus to hear and determine the applications according to law.

The applicant for a licence under s. 1 of the Alehouse Act, 1828, must be a person keeping or about to keep an inn, alehouse, or victualling house for the sale of excisable liquors by retail, to be drunk or consumed on the premises therein specified; and the applicant for a beerhouse licence must under the Beerhouse Act, 1840, s. 1, be the real resident

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holder and occupier of the dwelling-house in which he shall apply to be licensed:—

*Semble*, by Vaughan Williams L.J. and Stirling L.J. (Fletcher Moulton L.J. dissenting), that no ground for the issue of a certiorari to bring up a licence granted by licensing justices is afforded by the fact that the justices have erroneously decided that the applicant for the licence was such a person or such an occupier as aforesaid.

There is now jurisdiction to give costs to the successful applicant for a certiorari in the King's Bench Division.

*Reg. v. London County Justices*, [1894] 1 Q. B. 453, followed in preference to *London County Council v. Churchwardens, &c., of West Ham*, [1892] 2 Q. B. 173.

APPEAL from the orders of a Divisional Court (Lord Alverstone C.J., Ridley J. and Darling J.) as after mentioned.

The corporation of Leeds had, by virtue of a provisional order made under the Housing of the Working Classes Act, 1890 (53 & 54 Vict. c. 70), and confirmed by Act of Parliament, for the improvement of a district in Leeds, giving them compulsory powers of purchase, purchased (inter alia) a number of licensed premises within the district, some of which were licensed as ale-houses and others as beerhouses. It appeared that the licensing committee were of opinion that there were too many licensed premises in the district, and that negotiations had taken place between the corporation and a sub-committee of the licensing committee of the justices for effecting an arrangement for the extinction of the licences in respect of a certain number of the before-mentioned premises, the corporation receiving compensation for the same; the result of which negotiations was, in the opinion of the Court of Appeal, that there was an arrangement between the corporation and the justices whereby the latter accepted an offer made by the corporation for the extinction of the licences at a certain price, and undertook at the next general annual licensing meeting to submit that offer to the compensation authority. The corporation subsequently removed the fittings of these premises, possession of which was given up by the holders of the licences, and placed in occupation of them, as caretakers, employees of the corporation, mostly scavengers in their employ, who paid no rent and continued to receive wages from the corporation. At the adjourned general annual licensing meeting in March of the present year applications

were made on behalf of the occupiers for the renewal of the licences. Notice of objection to the renewals, on the ground that, there being too many licensed premises in the district, the licences were unnecessary, had been served on the occupiers by the clerk to the justices. Objections were also raised by other parties, who were representing brewers carrying on business in Leeds, on the ground, in substance, that the applicants were not fit persons to hold licences and the premises had been dismantled, and that the applications were not made bona fide, because the applicants were not persons keeping or intending to keep the premises for the sale of excisable liquors and there was no intention of carrying on business under the licences. The justices overruled the last-mentioned objections, and referred the applications, with their reports thereon, to the quarter sessions under s. 1 of the Licensing Act, 1904, granting provisional licences to the applicants. It appeared that it was the general practice of the justices on applications for the renewal of a licence, where the applicant had not been the previous holder of the licence, to require certificates as to the character of the applicant, which was not done with regard to the applicants in the present case. The objectors whose objections had been overruled as before-mentioned obtained from a Divisional Court rules nisi for a certiorari to bring up and quash the provisional licences granted and the reports of the licensing justices, for a mandamus to the licensing justices to hear and determine the applications for the licences according to law, and for a prohibition to the quarter sessions from acting upon the reports submitted by the licensing justices. Cause was subsequently shewn on behalf of the corporation of Leeds and the provisional licence-holders against these rules, and they were ultimately discharged. (1)

The applicants for the rules appealed.

May 4, 7, 10, 11, 29. *Danckwerts, K.C.*, and *J. A. Simon*, for the appellants. The licensing justices never really heard and

(1) It was agreed by the counsel for the respondents before the Court of Appeal that no further proceedings should be taken by the compensation authority upon the reports of the

licensing justices in the event of a mandamus being granted for a rehearing of the applications, and therefore it is not necessary further to refer to the proceedings for a prohibition.

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determined the applications for renewal of these licences according to law. They never adjudicated upon the merits as appearing before them at the general annual licensing meeting, but simply carried out a bargain previously made by the licensing committee with the corporation. If they had really considered the matter, it would have been apparent to them that they had no jurisdiction to decide as they did; for, besides the fact that the applicants were not fit persons to have licences, by the Alehouse Act, 1828 (9 Geo. 4, c. 61), s. 1, it is clear that, in the case of licences under that Act, the justices have only jurisdiction to grant licences to persons keeping, or being about to keep, inns, alehouses, and victualling houses for the sale of excisable liquors therein, and by the Beerhouse Act, 1840 (3 & 4 Vict. c. 61), s. 1, in the case of beerhouses, the licence cannot be granted to anyone who is not the real resident holder and occupier of the house. It is clear that in this case the occupiers of the premises which had been alehouses were not keeping, or about to keep, inns, alehouses, or victualling houses for the sale of excisable liquors therein, when the applications were made at the general annual licensing meeting; and similarly it is clear that the occupiers of the premises which had been beerhouses were not the real resident holders and occupiers of the houses in the sense intended by the Beerhouse Act, 1840. It is obvious upon the facts that there was no intention whatever that these premises should be used any more as licensed premises by anybody, and the occupants were only put up to make the applications for renewal of the licences as part of the machinery for carrying out the agreement made between the corporation and the licensing committee for the extinction of the licences upon compensation being made to the corporation under the Licensing Act, 1904. The licensing justices exercised no discretion with regard to the applications for renewal, and there was no real hearing of the objections taken to the renewal of the licences.

The licensing justices, who were parties to the arrangement made with the corporation, were clearly biased as regards the result of the applications for renewal. *Rex v. Howard* (1) was

a wholly different case from the present. There the objection was merely that some of the justices had made a preliminary investigation of the cases before the licensing meeting.

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Certiorari will lie to bring up a grant of a licence by licensing justices. It was no doubt held in *Sharp v. Wakefield* (1) that licensing justices had as absolute a discretion to refuse the renewal of a licence as in the case of an application for the grant of a licence de novo; and in *Boulter v. Kent Justices* (2) it was held that licensing justices were not a Court of summary jurisdiction, and, in the case of an application for renewal of a licence, there was no "lis," to which an objector was a "party," so that an order for costs could be made against him; but it does not follow from either of those cases that a certiorari will not lie to remove a grant of a licence by licensing justices, as was supposed in *Reg. v. Sharman*. (3) It has no doubt been said that a certiorari will only lie to remove a "judicial" decision, but the authorities shew that for this purpose the term "judicial" must not receive too strict a construction. It was held in *Sharp v. Wakefield* (1) that the discretion of the licensing justices must be exercised "judicially." *Boulter v. Kent Justices* (2) decided that licensing justices, acting in regard to an application for the renewal of a licence, are not a Court giving judgment in a litigation in the strict sense of the term, but it did not in any way determine the question whether their decision is or is not "judicial" in the sense necessary for the purpose of granting a certiorari. It was held in *Reg. v. Manchester Justices* (4) and *Rex v. Sunderland Justices* (5) that a certiorari would lie to bring up the decision of justices sitting as the confirming authority under the Licensing Acts. *Reg. v. Bowman* (6) merely followed *Reg. v. Sharman*. (3) The cases of *Reg. v. De Rutzen* (7) and *Reg. v. Cotham* (8) shew that a mandamus will lie in such a case as this.

The question of the applicants' qualification under s. 1 of the Alehouse Act, 1828, and s. 1 of the Beerhouse Act, 1840, goes to the root of the licensing justices' jurisdiction, and the justices

(1) [1891] A. C. 173.

(5) [1901] 2 K. B. 357.

(2) [1897] A. C. 556.

(6) [1898] 1 Q. B. 663.

(3) [1898] 1 Q. B. 578.

(7) (1875) 1 Q. B. D. 55.

(4) [1899] 1 Q. B. 571.

(8) [1898] 1 Q. B. 802

C. A. cannot give themselves jurisdiction by deciding erroneously upon that question: *Milward v. Caffin* (1); *Liverpool Gas Co. v. Everton*. (2) Even if the justices were a Court for this purpose, their decision would not bind this Court, but it is clear from *Boulter v. Kent Justices* (3) that, though acting judicially, they are not a Court. In the present case they really did not enter into the inquiry whether the applicants were qualified as being persons who were keeping or about to keep inns, alehouses, or victualling houses, or as being real resident holders and occupiers of the premises. They simply gave effect to the previous arrangement which had been entered into with the corporation. *Reg. v. Manchester Justices* (4) shews that a certiorari will lie to bring up a licence granted to a person not qualified by law to hold it. [See also *Rex v. Somersetshire Justices* (5); *Thompson v. Harvey* (6); *Nix v. Nottingham Justices* (7); *Wilson v. Crewe Justices*. (8)]

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*Scott Fox, K.C.*, and *Bairstow*, for the respondents. There was no agreement or bargain between the corporation and the licensing justices in the sense suggested by the appellants. All that happened really was that an offer was made by the corporation not to oppose any objection made by the justices on the ground that the licensed houses were unnecessary, and to acquiesce in a reference to the compensation authority under the Licensing Act, 1904, on certain terms. There was nothing that in any way bound or fettered the discretion of the justices who formed the licensing committee in dealing with the applications for renewal of the licences at the general annual licensing meeting, and there is nothing to shew that they acted improperly in the action which they took, or that they were biased or improperly influenced by the negotiations which had taken place: *Rex v. Tolhurst*. (9)

It is submitted that the licensing justices had jurisdiction to decide as they did. The applicants for the licences were the

(1) (1780) 2 Wm. Blackstone, 1330.

(2) (1871) L. R. 6 C. P. 414.

(3) [1897] A. C. 556.

(4) [1899] 1 Q. B. 571.

(5) (1826) 5 B. & C. 816.

(6) (1859) 4 H. & N. 254.

(7) [1899] 2 Q. B. 294.

(8) [1905] 1 K. B. 491.

(9) [1905] 2 K. B. 478.

occupiers of the premises, and they were persons who were asking for authority to keep the premises as alehouses or beer-houses, as the case might be. They were willing, no doubt, that the licensed premises should be dealt with as unnecessary, but there was nothing to shew that they were not ready and willing to keep them on as licensed premises, if the justices determined that they were necessary. The words "about to keep inns, &c.," point to intention in the future to do so. That must necessarily mean intention to do so, if circumstances permit or require. The question whether the applicants were so qualified or not being one within the jurisdiction of the justices to determine, and which they must determine, even if they decided it wrongly, the Court cannot interfere by certiorari. It is part of the merits of the case, and not a question of fact collateral to the case upon which the limit of the jurisdiction depends within the meaning of the judgment in *Bunbury v. Fuller* (1), to which Blackburn J. referred in *Pease v. Chaytor*. (2) The Licensing Act, 1904, has greatly altered the law on the subject, and has given vested interests in the licences to a certain extent to the owners of the licensed premises and the holders of the licences. It is contended that the occupier of a house with regard to which there is an existing licence, who applies at a general annual licensing meeting for a licence which will entitle him, on a proper application to the excise authorities, to a licence to carry on the trade of selling intoxicating liquors on the premises, is such a person as is entitled to make an application for a renewal of a licence within the purview of s. 1 of the Licensing Act, 1904. The words in s. 1 of the Alehouse Act, 1828, cannot have the effect of making the existence of an actual immediate intention to sell intoxicating liquors on the premises a condition precedent to the jurisdiction of the licensing justices to grant the licence. They only describe, correctly enough, the general purposes for which the general annual licensing meeting is to be held. The situation has been changed to some extent with regard to those purposes by the introduction of the Licensing Act, 1904. The meaning of the words "being about to keep inns, &c.," is quite sufficiently

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(1) (1853) 9 Exch. 111, at p. 140.

(2) (1863) 3 B. & S. 620.



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satisfied by reading them as equivalent to "being desirous of, or applying for, authority to keep inns, &c." Evidence that the applicant really intends to keep an inn, &c., may be a material element in leading the justices to a conclusion as to whether, in their discretion, they will grant a licence, but it does not go to the jurisdiction to grant the licence. The case of *Reg. v. Liverpool Justices* (1) shews that this is so, for there the occupier at the time of the licensing meeting clearly had no intention herself of keeping the house for the sale of intoxicating liquors, as she was about to leave in consequence of illness in her family. It is true that that was the case of an application for the transfer of a licence under s. 14 of the Alehouse Act, 1828, and not for a grant or renewal of a licence under s. 1, but the principle is the same; for the case turned on the question whether the occupier at the time of the general annual licensing meeting could legally have made an application for a renewal of the licence, but had neglected to do so: see per Brett M.R. on pp. 644, 645 of the report in the Law Reports. It is not necessary for the purpose of founding jurisdiction that the justices should inquire into the applicant's mental intention with regard to keeping an inn, &c.; it is enough that the person is occupier of the premises, and that he applies for authority to keep an inn, &c. The person who is in occupation of a house as to which there is an existing licence is for this purpose a person keeping it within the meaning of the Alehouse Act, 1828. [They referred on this point to *Price v. James* (2); *Reg. v. Wilkinson* (3); *Reg. v. Market Bosworth Justices* (4); *Symons v. Wedmore*. (5)]

With regard to the beerhouses, it is submitted that the applicants were the real resident holders and occupiers of the premises within the meaning of the Beerhouse Act, 1840, s. 1. The licences to which it is made a condition precedent that the licensee shall be the real resident holder and occupier of the premises are really the excise licences. The justices no doubt would not grant a beerhouse licence to a person who would not answer that description upon his application for the excise

(1) (1883) 11 Q. B. D. 638.

J. P. 597.

(2) [1892] 2 Q. B. 428.

(4) (1887) 56 L. J. (M.C.) 96.

(3) (1864) 10 L. T. 370; 28

(5) [1894] 1 Q. B. 401.

licences, but the applicants would satisfy this test. There is, however, nothing really which makes it a condition precedent to the grant of the beerhouse licence by the justices that the applicant should be the real resident holder and occupier of a beerhouse.

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A certiorari will not lie to bring up the decision of licensing justices at a general annual licensing meeting: *Reg. v. Sharman*. (1) It is clear from *Sharp v. Wakefield* (2) that the grant of a licence by licensing justices is not a judicial but an administrative act. It was no doubt said in that case that the justices must decide in a judicial spirit, and not capriciously, but that does not shew that their act is a judicial act in the sense that a certiorari will lie. *Boulter v. Kent Justices* (3) clearly shews that it is not. The decision of the justices acting as confirming authority under the Licensing Acts does not stand on the same footing in this respect. [They also cited on this point *Rex v. Southampton Justices* (4); *Royal Aquarium and Summer and Winter Garden Society v. Parkinson*. (5)]

Assuming that certiorari would lie, the objectors are not parties aggrieved, and therefore not entitled to the writ. They have no legal interest in the fund raised for compensation under the Licensing Act, 1904, any more than any other member of the public. It is a fund raised for the purpose of compensation under the Licensing Act, 1904, but even those contributing to it have no legal interest for this purpose in the disposition of it. [They cited on this point *Reg. v. Surrey Justices*. (6)]

*Reg. v. Nicholson* (7) shews that a mandamus ought not to go in such a case as this, the justices having really heard and determined the matter.

*Danckwerts, K.C.*, in reply. The authorities clearly shew that writs of certiorari have been granted to bring up many orders and decisions which could not be called "judicial" in any but a very wide sense of the term. The true antithesis for this purpose seems from the cases to be between "judicial" and

(1) [1898] 1 Q. B. 578.

(2) [1891] A. C. 173.

(3) [1897] A. C. 556.

(4) [1906] 1 K. B. 505.

(5) [1892] 1 Q. B. 431.

(6) (1888) 52 J. P. 423.

(7) [1899] 2 Q. B. 455.

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 1906 *Lancashire Justices* (1); *Reg. v. Aberdare Canal Co.* (2); *Rex v.*  
 REX *Johnson* (3); *Reg. v. Surrey Justices* (4); *Rex v. Groom.* (5)]  
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 WOODHOUSE. The objectors clearly had an interest in the matter of the  
 application of the compensation fund. But even if they had not,  
 the result is that, though the issue of the writ is not *ex debito*  
*justitiæ*, the Court have a discretion to issue it: *Reg. v. Surrey*  
*Justices.* (4)

*Cur. adv. vult.*

May 29. VAUGHAN WILLIAMS L.J. read the following judgment:—In this case the King's Bench Division must be taken to have refused three writs asked for by the present appellants—a writ of certiorari, a writ of mandamus, and a writ of prohibition. The proceedings leading up to these refusals do not seem to have been quite regular, but by consent given in the King's Bench Division in the presence of the Court these three writs must be taken to have been applied for and refused. It is, however, unnecessary to consider the writ of prohibition, because by consent given before us it is agreed by the compensation authority that, in the event of a writ of mandamus being granted, the compensation authority will not proceed to grant a licence or assess compensation.

The first question raised is whether a writ of certiorari will lie to licensing justices. It is contended that it will not. This contention was primarily based upon the decision of the Queen's Bench Division in *Reg. v. Sharman* (6), in which case it was held that the granting of the licence by the justices at the general annual licensing meeting was not a judicial order, but was a mere decision of the justices sitting in a licensing meeting for the performance of duties which were administrative duties, and it is expressly stated in the judgment that there was no want of jurisdiction to make the order sought to be quashed. This decision seems to have been largely based on *Boulter v. Kent Justices.* (7)

(1) (1839) 11 A. & E. 144.

(2) (1850) 14 Q. B. 854.

(3) [1905] 2 K. B. 59.

(4) (1870) L. R. 5 Q. B. 466.

(5) [1901] 2 K. B. 157.

(6) [1898] 1 Q. B. 578.

(7) [1897] A. C. 556.

It will be observed that the judgment of Wright J. in *Reg. v. Sharman* (1) suggests that the learned judge thought that a certiorari would lie to bring up such an order in a case where there was want of jurisdiction to make the order; and it has been urged before us in the present case that there was no jurisdiction to make the order sought to be removed. But I doubt myself whether the fact that there was no jurisdiction to make an administrative, as distinguished from a judicial, order would enable the Court to issue a certiorari to bring up an administrative order: see *Rex v. Pryse Lloyd* (2) and *Reg. v. Salford Overseers*. (3) In my judgment, however, *Boulter v. Kent Justices* (4), on which, as I have said, the argument in *Reg. v. Sharman* (1) seems to have been based, is not an authority for the decision in that case that a certiorari will not lie to bring up an order of licensing justices; for, if *Boulter v. Kent Justices* (4) is examined, it will be seen that all that was decided was that justices sitting in licensing sessions are not a Court of summary jurisdiction, and that their decision to grant or refuse a licence is not an order within the meaning of the Summary Jurisdiction Acts, and that the Court of quarter sessions had no jurisdiction to order payment of costs by the appellant, who did not appear to support the decision of the licensing justices on the appeal of the licensee, and who was in no sense a party to that appeal, but was only the objector whose objection led the licensing justices to refuse to renew the licence of the licensee of a public-house, the appellant to the Court of quarter sessions against the decision of the licensing justices refusing to renew his licence. The decision did not expressly deal with the question whether a certiorari will lie to bring up the determination of licensing justices in their capacity as a licensing authority. It did decide that the licensing justices acting in their capacity as licensing justices do not act as a Court, and that they have no "lis" before them on which to adjudicate and no opposing parties, objectors merely representing the public and no individual interests of their own. At all events, *Boulter v. Kent Justices* (4) does not decide that in no case will a certiorari lie to bring up the determination of the

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(1) [1898] 1 Q. B. 578.

(2) (1783) Caldecott, 309.

(3) (1852) 18 Q. B. 687.

(4) [1897] A. C. 556.



C. A.      licensing justices or that it will not lie in cases where the justices  
 1906      have no jurisdiction because either of their personal want of  
 REX      qualification or of the subject-matter being outside the jurisdiction  
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On the question whether a certiorari may lie, although the order made by them is not the order of a Court and no "lis" is before them, I will refer first to the case of *Rex v. Pryse Lloyd* (1), a case in which a rule nisi for a certiorari had issued to bring up an order of quarter sessions ordering Mr. Edward Jones, an attorney, to bring an information against the defendant for several misdemeanours committed by him in the execution of his office of justice of the peace, and a motion was made to enlarge the rule, and Buller J. said: "The certiorari ought not to have issued. It is settled in the case of *Rex v. Lediard* (2) that a certiorari does not lie to remove any other than judicial acts"; but the reporter seems by his note to doubt whether the decision in that case went beyond deciding that a certiorari would not lie to return a ministerial act, for the order in that case amounted to no more than a warrant; but when Bower of counsel urged that the act of sessions was clearly illegal and such an excess of their authority as it was impossible to support, the Court admitted this, but said "then you may punish the justices for making it, and the rule was discharged and the certiorari quashed." This case does not limit the application of the remedy of certiorari to the bringing up of orders of inferior Courts, but speaks of the certiorari not lying to remove any other than judicial acts. I ask myself, therefore, the question whether the licensing justices in granting or refusing a licence do a judicial act. In my opinion the grant or refusal of such a licence is a judicial act, and the judgment of Lord Halsbury in *Sharp v. Wakefield* (3) seems to be an authority for this view; for he says, as appears on p. 179 of the report, that "an extensive power is confided to the justices in their capacity as justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that that something has to be done according to the rules

(1) Caldecott, 309.

(2) (1751) Sayer, 6.

(3) [1891] A. C. 173, at p. 179.

of reason and justice, not according to private opinion, according to law, and not humour; it is to be, not arbitrary, vague, and fanciful, but legal and regular." This view seems to me to be confirmed by old and recent decisions. It is impossible to read under the title "Certiorari" in Burn's Justice of the Peace the list of the cases in which a writ of certiorari has been granted and the grounds for granting it without seeing that in practice a certiorari has issued in cases in which it is impossible to say that there was a Court and a "lis." The case of *Reg. v. Saunders* (1), in which there was an order of quarter sessions allowing or disallowing items in the treasurer's accounts, seems to be one instance. The appointment of paid constables by justices in special sessions under 5 & 6 Vict. c. 109 seems to be another instance: see *In re Constables of Hipperholme*. (2) Again, a number of cases will be found cited in the argument in *Reg. v. Aberdare Canal Co.* (3), in which the order brought up was not in any sense the order of an inferior Court, but merely a judicial act. The order in that case was an order by commissioners approving the making of a bridge over the Aberdare Canal. The section of 33 Geo. 3, c. 95, under which the commissioners made the order was s. 54, which ran thus: "The company are to make such bridges," &c., "and other works across the canal," &c., "for the convenience of the occupiers of land through which the canal passes as the commissioners shall from time to time judge necessary and appoint." Coming to recent cases, A. L. Smith M.R., in his judgment in *Rex v. Sunderland Justices* (4), says: "It was argued for the respondents that a writ of certiorari would not lie in a case such as the present. Before the decision in *Boulter v. Kent Justices* (5) the practice appears to have been to bring up such orders by certiorari, but it is contended that the judgment of the House of Lords in that case shews that this cannot now be done. I see no ground for extending the effect of that decision to the present case. The decision in *Boulter v. Kent Justices* (5) related only to proceedings before the licensing meeting. The House of Lords held that the licensing

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(1) (1854) 3 E. &amp; B. 763.

(3) 14 Q. B. 854.

(2) (1847) 5 D. &amp; L. 79.

(4) [1901] 2 K. B. 357, at p. 368.

(5) [1897] A. C. 556.

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meeting was not a Court of summary jurisdiction, and possibly it may follow, therefore, that a certiorari would not lie to bring up proceedings before the licensing meeting. In the case of *Reg. v. Manchester Justices* (1) Channell J. held that a certiorari would lie to bring up an order made by justices as the confirming authority under the Licensing Acts. I agree with him in the conclusion at which he there arrived, and in the grounds which he gave for it." With regard to the case of *Reg. v. Sharman* (2), its authority was doubted in *Reg. v. Cotham* (3) by Wills J., and I gather from the judgment of Channell J. in *Reg. v. Manchester Justices* (1) that he also doubted the authority of *Reg. v. Sharman* (2), which he distinguished. On the whole, I have come to the conclusion, which is a conclusion arrived at also by the Lord Chief Justice, that the granting or refusing of a licence by the justices at the general annual licensing meeting is a judicial act, and that a certiorari will lie to bring up their determination, and this being so, we have only to consider the facts of this case, so as to determine whether the rule for the certiorari ought to be discharged or made absolute.

Now the first ground suggested for making the rule absolute is that the justices acted without jurisdiction in granting the provisional licence for the alehouses, and also in granting the provisional certificate or licence for the beerhouses. In the case of the alehouses, it was argued that the effect of s. 1 of the Alehouse Act, 1828, is to limit the jurisdiction of the justices to the grant of a licence under the Act to "persons keeping or being about to keep inns, alehouses, &c.," and that the evidence taken before the licensing justices in this case shewed that the applicants were neither "keeping nor about to keep" the alehouses in question; and in the case of the beerhouses it was argued that the evidence before the licensing justices negatived the applicant being "a real resident holder and occupier of the house" within the meaning of s. 1. of the Beerhouse Act, 1840. I will assume at this point of my judgment that the question whether the applicant in the case of an alehouse is "keeping or about to keep" the alehouse for which the licence is sought is a

(1) [1899] 1 Q. B. 571.

(2) [1898] 1 Q. B. 578.

(3) [1898] 1 Q. B. 802.

question of fact, and that the words "being about to keep" are not satisfied, without evidence, by the inference of intention to be drawn from the mere fact of an application being made, and that the evidence negated the applicant in the case of each alehouse being the keeper of, or about to keep, the alehouse the subject of the application. I may mention that, if this assumption were not made, the result would be to give no effect to the words "persons keeping, &c.," because every applicant would be qualified to obtain a licence. I will also assume in the beerhouse cases that the evidence negated the applicant being "a real resident holder and occupier" of the beerhouse for which the licence was sought. Now, in my opinion, these questions of fact were questions which the licensing justices were competent to entertain and decide; and I think that, this being so, no certiorari will lie to bring up the order of the justices on the ground that their decision on this question was wrong. It is pointed out by Sir James Colville, in delivering the judgment of the Privy Council in *Colonial Bank of Australasia v. Willan* (1), that absence of jurisdiction may be founded either on the character and constitution of the tribunal, or upon the nature of the subject-matter of the inquiry, or upon certain proceedings which have been made essential preliminaries to the inquiry, or upon a fact or facts to be adjudicated upon in the course of the inquiry, and he proceeded to say: "Objections founded on the personal incompetency of the judge, or on the nature of the subject-matter, or on the absence of some essential preliminary, must obviously, in most cases, depend upon matters which, whether apparent on the face of the proceedings or brought before the superior Court by affidavit, are extrinsic to the adjudication impeached. But an objection that the judge has erroneously found a fact which, though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject-matter, he properly entered upon the inquiry but miscarried in the course of it. The superior Court cannot quash an adjudication upon such an objection without assuming the functions of a Court of Appeal, and the power to retry a question which the judge was competent to decide. Accordingly the authorities,

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(1) (1874) L. R. 5 P. C. 417, at p. 442.



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of which *Reg. v. Bolton* (1) and *Reg. v. St. Olave* (2) may be taken as examples, establish that an adjudication by a judge having jurisdiction over the subject-matter is, if no defects appear on the face of it, to be taken as conclusive of the facts stated therein, and that the Court of Queen's Bench will not on certiorari quash such an adjudication on the ground that any such fact, however essential, has been erroneously found." I do not think that the questions with which I have been dealing are questions collateral to the merits of the case upon which the limit to the jurisdiction depends within the meaning of the judgment in *Bunbury v. Fuller* (3), cited by Blackburn J. in *Pease v. Chaytor* (4), where it is said that "It is a general rule that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case upon which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet upon this preliminary question its decision must always be open to inquiry in the superior Court."

The observations which I have made do not, of course, dispose of the objection that the justices were disqualified by reason of the arrangement made by them with the corporation. On the whole I have come to the conclusion that they are so disqualified. I need hardly say that I come to this conclusion with hesitation, since I am differing from the judgment of the Lord Chief Justice concurred in by Ridley J. and Darling J. The Lord Mayor of Leeds, as appears on the first page of the transcript of the shorthand notes of the hearing of the application for the renewal of licences to the licensed houses, the property of the corporation, himself at the very beginning of the hearing used these words: "Now the first objection that we have to inquire into is the objection to property that is within the area of operations of the corporation. Large plots of ground have been bought with large

(1) (1841) 1 Q. B. 66.

(2) (1857) 8 E. & B. 529.

(3) 9 Exch. 111.

(4) 3 B. & S. 620.

numbers of buildings on. Some have been demolished in consequence of being unhealthy; but there are a number of hotels there that the corporation do not propose to demolish, and the licensing committee have had an offer made to them by the corporation to extinguish these licences for a certain price. Now at the time that this took place—it was before November 9—at that time I was not a member of the corporation, but I am a member of the corporation now. All the business that was done with respect to this question was done before that time. I was chairman of the licensing committee, and the offer was made by the sub-committee, and we undertook to submit that to the compensation authority, which, of course, means the whole bench of magistrates of the city of Leeds.” Taking these matters into consideration, I cannot avoid the conclusion that there was an arrangement between the corporation and the licensing justices, whereby the licensing justices accepted an offer made to them by the corporation to extinguish the corporation licences for a certain price, and undertook to submit that offer to the compensation authority. It seems to me that the licensing committee could only carry out their undertaking by holding that all objections based on the individual deficiency of the proposed holder on the ground of fitness or character, or on the ground of structural unfitness of the house, failed, for, unless they did this, the offer of the corporation could not be submitted to the compensation authority. These objections were in fact overruled, and this without the justices having called upon the applicants to comply with the ordinary rule of practice under which the applicant has to produce a character signed by persons who know him and testify their belief that he is a person of good character. It seems to me impossible under these circumstances that the licensing justices should have brought to the hearing impartial minds as they were bound to do. I do not quite understand what the Lord Chief Justice says in his judgment about this. He says: “The objections are two. The first is that, in acting as they did on March 8, 1906, the magistrates were only carrying out a pre-arranged bargain that certain houses should be reported, and that in respect of those houses compensation should be paid. If I had any ground for thinking that

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the merits of the question whether these houses should be reported or not were directly or indirectly affected by such a bargain, I should have come to a different conclusion. I should have thought that the magistrates, in deciding whether certain houses should be reported or not, ought not to have entered into any arrangement as to what houses should be reported. But that would be too narrow a view of the duties of magistrates under the Act of 1904, and to a certain extent would rather nullify its main provisions." But it seems to me that the objection taken in this case was in effect an objection on the score of bias, and, in the case of such an objection, as was laid down in *Rex v. Sunderland Justices* (1), the question is not whether the justices were really biased, or, in fact, decided partially, but whether there was a real likelihood of bias. No one charges the justices in this case with conscious wrongdoing, either in making the arrangement with the corporation or in adjudicating upon the brewers' objections. The licensing justices had a strong feeling that the corporation were entitled to compensation under the Act of 1904, and made the arrangement with the corporation which they did make, including the undertaking to submit the corporation offer to the compensation authority, for the express purpose of securing that compensation. I agree with the Lord Chief Justice that, leaving the Act of 1904 out of consideration, "the magistrates, in deciding whether certain houses should be reported or not, ought not to have entered into any arrangement as to what houses should be reported"; but, with the greatest deference, I cannot agree with the Lord Chief Justice when he goes on to say, "but that would be too narrow a view of the duties of magistrates under the Act of 1904, and to a certain extent would rather nullify its main provisions." It is quite true that in the case of *Rex v. Howard* (2), in the Court of Appeal, it was decided that there was no incompatibility between the position of the justices who adjudicate and that of an objector, and that the justices, in arriving at their determination as to granting or refusing a licence, are not bound to determine the question merely on materials provided by the individual who happened to object, but may take into consideration their local

(1) [1901] 2 K. B. 357.

(2) [1902] 2 K. B. 363.

knowledge and the results of investigations which they have caused to be made, and the report of a committee of justices on the question of the excess of licensed houses in a district, dealing with each house. But this does not seem to me to justify an arrangement such as that arrived at in this case between the corporation and the licensing justices or the undertaking to submit the corporation's offer to the compensation authority, since this could only be carried out by first deciding that the objection on grounds individual to the applicant or the licensed premises failed. The distinction is between prediscussion and an arrangement involving predetermination. Later on in his judgment the Lord Chief Justice deals with the objection that these licences ought not to have been granted to the particular applicants at all, and says, with reference to this question, that, if this was an ordinary case of a person who had dismantled his house and put in a caretaker and did not intend to carry on the business of a licence-holder at all, he would have had grave doubts as to whether the licences could have been granted to them, and he would assume that the licences ought not to have been granted to them. I agree in this view; but I think that, if the licensing justices really did hear and determine these objections, we cannot review their decision; and I think this was the view of the Lord Chief Justice; and I entirely agree that there was nothing improper in the owner of public-house property properly considering and discussing with the licensing authority the question whether licences should be retained absolutely or should be dealt with under s. 1, sub-s. 2, of the Act of 1904. But I fail to see why this should disentitle an objector to rely on what Lord Alverstone calls the technical objection that some of the houses had been dismantled. In my opinion, arrived at with reluctance, because the Lord Chief Justice and his brethren in the King's Bench Division have come to a different conclusion, the rule for a certiorari ought to be made absolute.

But this does not entirely dispose of the case. Mr. Danckwerts asks also to have the rule for a mandamus made absolute. I think that this should be done. I have come to the conclusion that the question on the brewers' objections as to the unfitness of the applicants and the houses was never really heard and

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 1906 not produce, and were not called upon by the justices to produce,  
 REX "character papers," according to the practice upon applications  
 v. for the grant or transfer of an intoxicating liquor licence, as  
 WOODHOUSE. stated in the affidavit of Mr. Thornton, the clerk to the justices,  
 Vaughan satisfies me that the justices at the time of the hearing had pre-  
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 the corporation to grant the provisional licences, so that the  
 offer of the corporation might be submitted to the compen-  
 sation authority. As pointed out by Wills J. in *Reg. v.*  
*Cotham* (1), "There is a distinction between an erroneous deci-  
 sion of justices and a failure to hear and determine. The line  
 was often very thin, and cases near the line on each side may be  
 found, but the leading principle is this—that, if the justices  
 have confined themselves to the sections and the points properly  
 to be considered in relation thereto, it does not matter how  
 erroneously they determined, for their decision in such a case  
 cannot be reviewed by a mandamus, but certainly, when it  
 appears by direct evidence that they have taken into considera-  
 tion matters wholly outside what they should properly consider,  
 the mandamus may go. In the case I have referred to a man-  
 damus was held to lie because they had taken into consideration  
 matters foreign to the points properly left to them. Such a  
 thing in the present case is not directly stated in the affidavits,  
 but if the fact was demonstrated by what had taken place the  
 result is the same. Here the justices have granted a licence to  
 a person intending to keep an inn, but not one belonging to  
 a person 'theretofore keeping' it. They must, therefore, have  
 entered upon some extraneous considerations. The rule for a  
 mandamus must be made absolute." (2) The question in that  
 case was not decided in respect of the grant of a new licence  
 or the renewal of an old licence, but in respect of a transfer  
 under ss. 4 and 14 of the Act of 1828; but I think that the rule  
 for a mandamus should be made absolute in this case because  
 the justices have, as appears, in my opinion, from the transcript  
 of the shorthand notes of what took place at the hearing, taken  
 into consideration matters foreign to the points properly left to

(1) [1898] 1 Q. B. 802; 78 L. T. 468.

(2) Cited from 78 L. T. 468.

them. I hope there is nothing to prevent the justices, when the application for these licences comes before them afresh, hearing and determining it free from the arrangement with the corporation and the undertaking by the licensing justices, and free from the notion that, because the arrangement was a bona fide attempt made with the intention to carry out the surrender clauses of the Act of 1904, they were entitled, upon hearing the application for the provisional licence, to treat the brewers' objection based on the dismantling as a technical objection which might be disregarded. The result is that these appeals must be allowed.

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STIRLING L.J. read the following judgment:—I have had an opportunity of reading the judgment which has just been given by the Lord Justice, and I agree with all his conclusions and the reasons he has given for them. I only desire to add for myself a few remarks on one or two of the points which were raised in the argument.

The Licensing Act, 1904, by s. 1, sub-s. 1, takes away from the licensing justices the power to refuse a renewal of on licences existing at the passing of the Act except on certain specified grounds, which may be stated broadly to be unfitness on the part of the applicant or unsuitability of the premises, and vests the power of refusal in all other cases in quarter sessions. When the licensing justices, on consideration of applications for the renewal of licences, are of opinion that the question of renewal of a particular licence requires consideration on other grounds than those just mentioned, the statute requires them to refer the matter to the quarter sessions together with their report thereon. It is further enacted that the quarter sessions shall consider all reports so referred to them, and may, if they think it expedient, refuse the renewal of any licence to which any such report relates, but subject to the payment of compensation under the Act (s. 1, sub-s. 2). The payment of compensation is regulated by s. 2, which provides (amongst other things) that the holder of a licence, if a tenant, shall (notwithstanding any agreement to the contrary) in no case receive a less amount than he would be entitled to as tenant from year to year of the licensed premises.

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The Act itself is silent as to what is to be done as regards existing on licences the renewal of which has thus been referred to the compensation authority; but the 41st of the rules made by the Secretary of State under s. 6 of the Act provides that the renewal authority shall grant the renewal of the licence in accordance with the application, but shall insert in the licence a statement "as to the renewal of the licence being provisional." The forms scheduled to the rules provide (Form 15) that this statement shall be as follows: "This licence is granted provisionally pursuant to the Licensing Act, 1904, and the rules made under that Act. If the compensation authority to whom the question of the renewal of the licence of the above-mentioned premises has been referred under that Act refuse the renewal of the licence, the licence will cease to have effect, if then in force, as from the expiration of the 7th day after the date, to be subsequently fixed in pursuance of those rules, for the payment of compensation." The licence, therefore, takes effect at once, but is made determinable in the event of a refusal to renew on the part of the compensation authority; if that event does not happen, the licence continues operative during the full period for which the licensing authority grants it.

In these circumstances, it seems to me that it is the duty of the licensing authority to inquire into the propriety of granting such a provisional (or, more properly, determinable) licence in the same way as if there was no ground of refusal of renewal to be dealt with other than those specified in s. 1, sub-s. 1, of the Act. I can see nothing in the Act which relieves the licensing authority of the duty to inquire whether the licence ought to be refused on any one or more of those specified grounds. The difficulties which I am about to point out with reference to the payment of compensation in the present case appear to me to confirm this conclusion.

In the present case some of the applications were for ordinary public-house licences; the others were for beerhouse licences.

The granting of public-house licences is regulated by the Alehouse Act, 1828, s. 1 of which prescribes for the holding annually of a special session of justices "for the purpose of granting licences to persons keeping or being about to keep inns, alehouses,

and victualling houses to sell excisable liquors by retail, to be drunk or consumed on the premises therein specified," and empowers the justices assembled at such meeting to grant licences "for the purposes aforesaid" to such persons as they shall in the execution of the powers conferred and in the exercise of their discretion deem fit and proper. In my opinion this section only authorizes the granting of licences to persons "keeping or being about to keep inns, alehouses, and victualling houses . . . on the premises therein specified."

The granting of beerhouse licences is regulated by the Beerhouse Act, 1840, s. 1 of which prescribes that no such licence "shall be granted to any person who shall not be the real resident holder and occupier of the dwelling-house in which he shall apply to be licensed." This statute therefore expressly prohibits the granting of such a licence to any person who does not possess the prescribed qualification.

Two questions then arise: 1. Were the applicants for the public-house licences persons keeping or about to keep inns, alehouses, and victualling houses on the premises in respect of which they applied? 2. Were the applicants for beerhouse licences the real resident holders and occupiers of the dwelling-houses in which they applied to be licensed? It was part of the duty of the licensing authority to inquire whether these questions ought to be answered in the affirmative. It was contended by those who opposed the renewal that these questions ought to be answered in the negative, and there was much to be said in support of this contention, for it was admitted that at the time when the licensing sessions were held the houses were dismantled and were occupied by servants of the corporation holding a humble position in life, who paid no rent, held no agreement for a tenancy, carried on no business in the houses, and as to whose future intentions of carrying on business there was, to say the least, room for doubt. In the judgment of the Lord Chief Justice in the Divisional Court the following passage occurs: "It is not disputed that, if, instead of getting rid of the original licensees, tenants, or occupiers, in December, 1905, and January and February, 1906, they had allowed these tenants to remain, and if, instead of dismantling some of the houses between December

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and March, they had allowed the fittings to remain in the houses, the objection could not substantially have been made. The brewers would not have had the right then to say, as they did say, that the application for renewal is not made in respect of a house which has been or is intended to be carried on as licensed premises : the application is not made bona fide for the house in respect of which the application is made, as the said house is about to be closed ; and it is because I think that the whole of what has happened between December and March really is, and must be regarded as, perhaps a not very wisely advised attempt to carry out the spirit of that which was understood by the corporation to be their rights under the Act of 1904 that I, for myself, think that we ought not to give effect to the objections that have been taken.” I entirely agree that, if the corporation had allowed the old tenants to remain carrying on business in the houses they occupied, the objections taken on behalf of those who actually opposed the renewal could not have been successfully taken ; but, speaking with the utmost respect, I am unable to come to the conclusion, as I think that the Lord Chief Justice did, that there was no difference in substance between such a renewal and that which actually took place. Having regard to the powers conferred by the Leeds (Housing of the Working Classes) Act, 1901, I see no reason to doubt that the corporation might lawfully continue to let the existing buildings as public-houses, or might grant building leases of new public-houses to be built on the same sites ; but, on the other hand, it does not appear, and indeed it was not even suggested at the Bar, that the corporation has power to carry on the business of a publican. Now, if the old tenants had been allowed to continue, each licensee would have been a real tenant, who would have carried on business under his licence until the period for which it was granted either expired or was determined by the action of the compensation authority. In the latter event he would have been entitled as tenant to claim the amount of compensation so carefully secured to licensees who are tenants by s. 2 of the Act of 1904, while the corporation would be entitled only to the balance. The compensation to the licensed tenant appears intended to protect the owner of a business actually being carried on against

loss occasioned by his no longer being able to carry it on in the premises. In the present case who is to receive that part of the compensation? Is it to be paid to the present holders of the provisional licences? They have never carried on business on the premises, and probably will never attempt to do so until the decision of the compensation authority as to renewal is arrived at, and will suffer no actual loss, if renewal is refused. To pay compensation to them would not really be compensating them for any loss, but would confer upon them a most unexpected windfall. If they do not receive any compensation, the only alternative seems to be that the corporation will receive the whole, although the corporation not only has never carried on such a business, but in my opinion cannot legally do so. Such questions as these could not arise, if, notwithstanding the reference of the question of renewal to the compensating authority, the licensing justices grant provisional licences only to persons duly qualified to hold them in accordance with the provisions of the Alehouse Act and the Beerhouse Act, and no others, and in my judgment this was the true meaning of the Act.

I only wish further to add that in my opinion the licensing committee and justices and the corporation acted in entire good faith in the matter, and that the corporation, in seeking to reduce the price paid for these public-houses by obtaining any compensation by law given to them in respect of non-renewal of licences, were not only acting within their legal rights, but, in my opinion, discharging a public duty. It is a matter of regret that the plan adopted by the corporation for the realization of this object was not more skilfully devised.

FLETCHER MOULTON L.J. read the following judgment:—The present case raises an important question under the Licensing Act, 1904, which presents considerable difficulties both as to the rights of the parties and the nature of the legal remedies, if any. It will be necessary, therefore, to examine somewhat closely both the facts and the law of the case: and I think it will be convenient to consider, first, the legal position and rights created by the Licensing Act, 1904; secondly, the facts of the case as bearing thereon; and, thirdly, the remedy, if any, to which the facts entitle the appellants.

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The functions of the licensing committee and the confirming authority, in cases relating to the renewal of a licence, have been so profoundly changed by the Licensing Act, 1904, that, in order rightly to appreciate the issues in this case, and to determine the duties of each of these bodies and the character of the jurisdiction which these duties imply, I shall examine in detail the case of an application for the renewal of an existing licence in the case of a county borough, which is the case that is actually before us.

An application for the renewal of a licence is made in the first instance to the licensing committee by virtue of the provisions of s. 5, sub-s. 4, of the Act of 1904. They have three courses open to them. If they are of opinion that the renewal should be refused on one or more of the four grounds set out in sub-s. 1 of s. 1, they can refuse the licence. In so doing they are acting under the powers of previous Licensing Acts which still remain in force, and it has accordingly been held that the applicant has an appeal against this refusal to the Court of quarter sessions of the county in which the county borough is situated; and, so far as I can gather from the provisions of the Act, that appeal must be decided by a consideration of those four grounds alone. On the other hand, the licensing committee may grant a renewal, *simpliciter*. In that case there is no appeal. But there is a third course open to the licensing committee. They may decide, in the language of sub-s. 2 of s. 1 of the Act of 1904, "that the question of the renewal of the licence requires consideration on grounds other than those on which the renewal of an existing on licence can be refused by them." In such case they must refer the matter with a report to the confirming authority, which, by virtue of the provisions of s. 8, sub-s. 2, consists, in the case of a county borough, of the whole body of licensing justices in the borough. The confirming authority must consider the report and, after due hearing, may grant the renewal, or refuse it, but in the latter case they must, by virtue of the provisions of s. 2, sub-s. 1, give compensation out of the fund created under the provisions of the Act. The amount of such compensation is fixed by that sub-section.

It is evident, therefore, that the licensing committee is no longer

in the position of being merely a tribunal of first instance in the case of the refusal to renew a licence. By its decision of the question whether the renewal requires consideration on grounds other than the four with which it is empowered to deal, it determines whether or not an ultimate refusal by the confirming authority shall be accompanied by the payment of compensation out of a fund substantially provided by other licence holders. It becomes, therefore, a matter of great importance to determine whether this question is left to it as a matter of pure discretion, or whether it is a matter on which it has to pronounce judicially. After giving the most careful consideration to the various sub-sections of s. 1 of the Act of 1904, and to such other portions of the Act as bear on the question, I have come to the conclusion that this matter is left to them in a judicial capacity. In my opinion the licensing committee are not entitled to refer the question of the renewal to the confirming authority, unless they have judicially come to the conclusion that the renewal requires consideration on other grounds than those above referred to, enumerated in s. 1, sub-s. 1. In other words, they must be of opinion on the one hand that those grounds for refusing the renewal which they are entitled to consider are not such as would make it their duty as licensing justices acting under the powers of the Licensing Acts, 1828 to 1902, to refuse the licence, and on the other hand that there exist other grounds which may affect the question of renewal. Unless they judicially come to such a conclusion they have no right to refer the matter to the confirming authority.

The gravamen in the present case is that the licensing committee never judicially decided this issue. It is contended by the appellants that they had before them objections coming within the limitations of sub-s. 1, which were of a character such as to make it their duty to refuse the renewal. It is also said that certain members of the licensing committee who took part in the proceedings had rendered themselves incapable of judicially deciding the issue in question by mixing themselves up with negotiations the object of which was to secure the extinction of these licences on certain terms as to compensation, so that they had a bias rendering them incompetent judicially to decide whether the

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matter should or should not be referred to the confirming authority, such reference being an essential step in the carrying out of the intended arrangements. The appellants contend that these grounds are each of them sufficient to invalidate the action of the licensing justices. To put it shortly, they say that the magistrates never dreamt of granting *de facto* renewals to these applicants. They were conscious that the applications were of such a character as would render it impossible for them to grant effective licences in respect of them, and they granted the renewals merely *pro forma* in order to make it possible to carry out a bargain as to the compensation which had been made between the corporation and the licensing justices.

Speaking for myself I am of opinion that, if either of these allegations can be established, a case is made out which warrants the interference of the Court. To permit the licensing justices so to act would in effect be to enable them to usurp the jurisdiction of the confirming authority. For instance, let us suppose that a renewal is asked for in the case of premises that are structurally deficient, or have been notoriously ill-conducted. If the licensing committee are entitled to shut their eyes to these matters, and at their will and pleasure to treat it as a case of reference and report, the confirming authority will find itself compelled either to grant a renewal in a case where a licence obviously ought to be refused, or to give to the applicant full compensation out of a fund which is unquestionably intended for those cases only in which the refusal of a licence is due partly at least to causes other than the unfitness of the applicant or the premises: and it follows as a practical consequence of placing the confirming authority in this dilemma that, the more grievously the application fails to satisfy the requirements of the law, the more certainly will the applicant receive compensation. I cannot think that this is what is intended by the Licensing Act, 1904, and therefore I come to the conclusion that the licensing committee were bound to consider judicially whether or no the application for the renewal of these licences required the consideration of grounds other than those enumerated in s. 1, sub-s. 1, and that, if the appellants can establish their contention that they did not do so, or that they had rendered themselves

legally incapable of doing so, they have established a claim for relief.

The first of these two contentions of fact put forward by the appellants is not an easy one to support. The discretion of the licensing committee to grant or refuse the renewal of a licence, even when the objections are confined to the grounds above referred to, is a wide one; and, in order to shew that the licensing magistrates did not judicially decide the issue, the appellants must shew either that they could not as a matter of law have decided it in favour of the reference, or that they did not as a matter of fact intend so to decide it. But, though the issue is a difficult one, the facts are very strongly in favour of the contention of the appellants. The houses had been dismantled as public-houses, and common labourers (principally men employed as scavengers by the corporation) had been put into the houses somewhat in the position of caretakers. It is almost impossible to think that the licensing magistrates deliberately came to the conclusion that such applications were applications that they would be justified in granting, when acting as a tribunal which had the responsibility of dealing according to law with objections of the types enumerated in s. 1, sub-s. 1.

But the appellants go further and say that the licensing committee were bound as a matter of law to refuse the licences, because the applicants were not persons to whom they had jurisdiction to grant licences. These licences were all granted under the jurisdiction conferred upon the magistrates by s. 1 of the Alehouse Act, 1828, which empowers them to hold licensing meetings "for the purpose of granting licences to persons keeping or being about to keep inns, alehouses, and victualling houses, to sell excisable liquors by retail, to be drunk or consumed on the premises therein specified." The applicants in this case were neither persons keeping nor persons about to keep such alehouses, and no one could have imagined that they were. They were therefore not members of the class to grant licences to whom the powers were by that Act given to the magistrates; and the appellants contend that the magistrates therefore had no authority to grant licences to persons other than such as came within that class,

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and that in granting these licences they exceeded their jurisdiction. In his very able argument Mr. Bairstow sought to convince us that these words "keeping or being about to keep" were not words of limitation and should be neglected. According to his contention the views of the Courts with regard to licensing law had undergone a great change since the decision in *Sharp v. Wakefield* (1) in the House of Lords; and he pressed upon us that to give weight to specific words such as those to which I have referred in s. 1 of the Alehouse Act, 1828, and to treat that section as in any way limiting the class of persons to whom licences might be granted was to commit the error of interpreting that statute in the light of a decision long subsequent to its date. I agree with him that the views of the Courts as to licensing law and licensing practice have been subject to much change, and that the decision in *Sharp v. Wakefield* (1) effected a considerable alteration therein, but in my opinion the effect of that decision was to bring back the earlier law, and not to introduce an innovation. For a long series of years licensing practice has suffered from a gradual tendency to emphasize the importance of the relation of the licence to the property, and to minimize the importance of the relation of the licence to the person. But we must remember that a licence has always been a licence to a particular person to retail liquor at a particular place, and, if we examine the language of the earlier statutes, it is evident that these two elements were considered to be co-ordinate and of parallel importance. In later years the tendency has been to look upon the person as unimportant, and capable of ready change, and to look at the premises as the essential element of the licence. In my opinion this is not a true view of the Act of 1828. If we look at Form C, which was made imperative by s. 13 of that Act, we find that the form of the licence shews that it was to be granted to persons "keeping or intending to keep" the alehouse, indicating that these words as they appear in s. 1 were by no means considered to be of little import. It is true that subsequent Acts have varied the form of the licence, but there has been no legislation which alters or qualifies in any way the terms

(1) [1891] A. C. 173

of s. 1 of the Act of 1828, or renders it less necessary that the applicant should come within the class of persons keeping or intending to keep the alehouse in question.

If these words are to have their due significance given to them, the question of fact is easy to decide. The counsel for the respondents did not in substance contend that the applicants were in fact keeping, or in fact intending to keep, or about to keep these alehouses. The utmost for which they contended was that the applications were good enough for the purposes of transfer. This is not enough. In my opinion the law no more permits licensing magistrates to grant a licence to an unfit man for the purposes of a subsequent transfer to one more fit than it permits them to grant a licence to an unfit house for the purposes of a subsequent transfer to another house that is more fit. I am satisfied on the evidence in this case that the magistrates did not in fact come to the conclusion that the applicants were persons keeping or entitled to keep these ale-houses. They had no right to treat as meaningless or unimportant the restrictive words in s. 1 of the Act of 1828. Those words were in my view intended to limit the class of persons to whom licences could be given, and, inasmuch as the applicants in this case obviously did not come within this class, the licensing committee were bound to refuse the licences. Such refusal was expressly within the scope of their powers, because the renewals would, if granted, be void as being an excess of their jurisdiction.

The above decision applies alike to all the cases. But some of the applications were for licences to beerhouses under the Act of 1840. In respect to these beerhouses a second objection arises. They come under the Beerhouse Act of 1840, and by s. 1 of that Act a licence can only be granted to one who is "the real resident holder and occupier" of the house in question. No one can, I think, doubt that, if words have any meaning, the applicants in the present case did not satisfy that description, and thus licences granted to them would be void under the express provisions of that section. This would in itself be sufficient for the decision of this part of the case, were it not that this section, and indeed the entire Act of 1840, refers to licences granted by the excise. Such licences must in all cases

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be obtained by keepers of beerhouses, but they are not identical with the licences granted by the magistrates in this case, which are granted under the provisions of ss. 4, 5 and 6 of the Wine and Beerhouse Act, 1869. The argument however is not seriously affected by this complication. These sections make it necessary to obtain a magistrates' licence, or, as it is there termed, "certificate," in order to obtain an excise licence, and it is obviously the duty of the licensing magistrates not to grant such a certificate to anyone who is not qualified to hold the licence in respect of which it is given. If it were necessary to support this proposition, it would only be necessary to look at the form of the magistrates' licence in the present case, which authorizes the applicant "to apply for and hold" a licence under the Beerhouse Act, 1840. Nor is it a matter on which there is any lack of authority. The Courts in the cases of *Reg. v. Manchester Justices* (1) and *Reg. v. Allmey* (2) have held that in the case of beerhouses the magistrates are impliedly restricted in granting licences to persons so qualified. So that, whether or not it can be said to be technically an excess of jurisdiction, the magistrates were bound, in my opinion, to refuse the renewal of these licences to the applicants on this ground also. The facts of the case abundantly shew that it was not possible for them to have decided the question whether the applicants were the real resident holders of the houses in the way they did, if they had applied their minds to deciding it at all. I am satisfied that they never intended to decide it.

But there is the further question as to whether the licensing magistrates or some of them had not conducted themselves with regard to these applications in such a way that they may reasonably be supposed to have had a bias which would unfit them for judicially deciding the important issue as to whether these applications should or should not be dealt with upon the grounds reserved to them under sub-s. 1 of s. 1 of the Act of 1904. As to this it is not necessary to go further than the statement of the lord mayor himself, who was president of the licensing committee on the occasion of the applications being made, and had also been chairman of the licensing committee at the date when the

(1) [1899] 1 Q. B. 571.

(2) (1871) 35 J. P. 534.

members of that committee were approached by the corporation on the subject. At the opening of the hearing of the applications he says as follows: "Now the first objection that we have to inquire into is the objection to property that is within the area of the operations of the corporation. Large plots of ground have been bought with large numbers of buildings on. Some have been demolished in consequence of being unhealthy, but there are a number of hotels there that the corporation do not propose to demolish, and the licensing committee have had an offer made to them by the corporation to extinguish these licences for a certain price. Now at the time that this took place—it was before November 9—at that time I was not a member of the corporation but I am a member of the corporation now. All the business that was done with respect to this question was done before that time. I was chairman of the licensing committee, and the offer was made by the sub-committee, and we undertook to submit that to the compensation authority, which of course means the whole bench of the city of Leeds." This appears to me to express frankly and accurately the arrangement that was made between the licensing committee and the corporation. I do not think that it was a bargain that the confirming authority should ratify the arrangements as to the extinguishment of the licences and the amount of the compensation, but I think that both the licensing committee and the corporation looked upon it as agreed that these licences should be sent on to the confirming authority to deal with. In other words, the licensing committee pledged themselves to decide in a particular way the important issue left in their hands as to whether the licences ought to be refused upon some or all of the grounds on which the licensing committee have jurisdiction to refuse them. The conduct of the corporation, both in dealing with the houses prior to the date of the application for renewal, and in conducting their case before the licensing justices, on the one hand, and the conduct of the licensing justices, in departing from their practice of requiring a certificate of character from new applicants for the renewal of licences, on the other, strongly confirm this view. At heart both parties looked upon the applications as mere formalities necessary to be gone through for the purpose of carrying out the

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agreement that had been made to the effect that these licences should be submitted to the confirming authority for the purpose of their accepting, if they thought them proper, the figures which had been arranged as the quantum of compensation. I do not for a moment think that either the lord mayor, or the members of the corporation, or the licensing justices acted in bad faith or intended to do anything which they thought was wrong, but the position in which the licensing justices had placed themselves was such that, in my opinion, they must be looked upon as being affected with bias in the decision as to referring the licences to the confirming authority, and therefore their decision in the matter cannot stand.

The next question is, What is the legal remedy?

If on the grounds above considered these provisional licences ought not to have been granted by the licensing magistrates, the reference to the confirming authority ought not to be allowed to stand; for, if the reference remains, the confirming authority must proceed upon it to adjudicate whether a licence shall be given, or compensation awarded, and I cannot see what power the Court would have to prevent it so proceeding. The form of the reference itself states that the licensing magistrates have "decided" to refer to the confirming authority the question of the renewal of the licence, and they have granted a provisional licence to enable this to be done, and, so long as the provisional licence and the reference stand, the licensing justices appear to me to be *functi officio*. They have set the procedure going, and they have no power to stop it. I can see no way by which a complete remedy can be given excepting by calling up on certiorari and quashing the provisional licence and order referring the matter to the confirming authority. The important question therefore is, Does certiorari lie in such a case as the present?

The writ of certiorari is a very ancient remedy, and is the ordinary process by which the High Court brings up for examination the acts of bodies of inferior jurisdiction. In certain cases the writ of certiorari is given by statute, but in a large number of cases it rests on the common law. It is frequently spoken of as being applicable only to "judicial acts," but the cases by which this limitation is supposed to be

established shew that the phrase "judicial act" must be taken in a very wide sense, including many acts that would not ordinarily be termed "judicial." For instance, it is evidently not limited to bringing up the acts of bodies that are ordinarily considered to be Courts. From very early times the common law courts considered that they had jurisdiction to examine into rates by certiorari, and the case of *Rex v. King and Others* (1), which is cited in the text books as an authority to the contrary, tends to support the view that their refusal to grant writs of certiorari in cases of poor rates was based on reasons of expediency and not on any doubt as to their powers. Orders of the Poor Law Commissioners can be brought up on certiorari, and the provisions of the Poor Law Amendment Act (4 & 5 Will. 4, c. 76), relating thereto do not purport to give the right, but treat it as a case of restricting the exercise of a right assumed to exist. In the case of *In re the Constables of Hipperholme* (2) the Court held that the order of two justices appointing a constable under the powers of 5 & 6 Vict. c. 109, s. 19, could be examined on certiorari. Other instances could be given, but these suffice to shew that the procedure of certiorari applies in many cases in which the body whose acts are criticized would not ordinarily be called a court, nor would its acts be ordinarily termed "judicial acts." The true view of the limitation would seem to be that the term "judicial act" is used in contrast with purely ministerial acts. To these latter the process of certiorari does not apply, as for instance to the issue of a warrant to enforce a rate, even though the rate is one which could itself be questioned by certiorari. In short, there must be the exercise of some right or duty to decide in order to provide scope for a writ of certiorari at common law.

With regard to the question whether the decisions of licensing justices can be brought up on certiorari the decisions are conflicting. In *Reg. v. Mann* (3) a decision of the licensing justices in respect of a beerhouse was brought up and discussed, and, although the Court did not find it necessary to quash the licence which had been granted, the judgments do not indicate any

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(1) (1788) 2 T. R. 234.

(2) 5 D. & L. 79.

(3) (1873) L. R. 8 Q. B. 235.



C. A.      doubt in the minds of the judges that they had the power so to  
 1906      do. In the case of *Reg. v. Sharman* (1) the Queen's Bench  
 REX      Division held that they could not do so on the ground that the  
 v.      granting of a licence was not a judicial act; and this case was  
 WOODHOUSE. followed in a later case, but these decisions have been doubted  
 Fletcher      on more than one occasion, and in the case of *Reg. v. Thornton* (2)  
 Moulton L.J.      the Court of Appeal on certiorari quashed an off licence granted  
                  by the licensing justices on the ground that they had no juris-  
                  diction to grant it. This case was, however (3), reversed in the  
                  House of Lords on the facts, no decision being given on the  
                  point as to whether a certiorari would lie, the Lord Chancellor  
                  (Lord Halsbury) expressly reserving this point as a point for  
                  future decision.

In the case of *Boulter v. Kent Justices* (4) the House of Lords heard and decided an appeal on a certiorari to bring up an order for costs made by quarter sessions when sitting on appeal from licensing justices. Now it is clear that quarter sessions sitting on appeal from licensing justices are still regulated by the Licensing Act, 1828: see the judgment of Lord Davey in *Tynemouth Corporation v. Attorney-General* (5). It is therefore clear that the mere fact that the jurisdiction is given by the Alehouse Act, 1828, is not sufficient to shew that certiorari does not apply to the proceedings. It is true that Lord Halsbury in the former case expressed his doubts as to whether justices at a licensing meeting are a Court at all. This, however, was not said with regard to the applicability of the procedure of certiorari to their decisions, and I do not think that his Lordship had in his mind any question of the remedy for excess of jurisdiction by licensing justices under circumstances where there can be no appeal, and where the question of the validity of their act cannot be raised in any subsequent proceeding based upon it, as is the case here.

But I do not think that it is necessary to find an exact precedent for the writ of certiorari in the present case, because the power of the Court to avail itself of that procedure depends, as

(1) [1898] 1 Q. B. 578.

Co. [1899] A. C. 222.

(2) [1898] 1 Q. B. 334.

(4) [1897] A. C. 556.

(3) Sub nom. *Lacey v. Lacon &*

(5) [1899] A. C. 293, at p. 307.

I have said, on the nature of the act to be reviewed, and this precise act and the jurisdiction to perform it date only from the coming into operation of the Licensing Act, 1904. This is, I believe, the first case under that Act in which the question has arisen, and we must therefore fall back on first principles and ask ourselves whether, in its nature, this act of deciding that the licences ought not to be refused on the grounds to which the jurisdiction of the justices extended, and ought to be referred to the confirming authority, was a judicial or a merely ministerial act. I have already stated that in my opinion it was clearly a judicial act, and I have no doubt, therefore, that the proceeding of certiorari is applicable to it, and, this being so, the fact that the magistrates had placed themselves in such a position as to subject themselves to a bias in favour of deciding in one particular way gives to the Court the power and the duty to quash their decision.

The question whether, apart from the question of bias, the licences granted by the magistrates should be quashed on the ground that the applicants were not the real residential holders of the beerhouses, or persons keeping or intending to keep the alehouses, raises a point which is in its nature one of great difficulty, i.e., whether that is a matter which is for the magistrates' decision and as to which their decision is final and binds the Court. It must always be borne in mind that a writ of certiorari is not intended to take the place of an appeal. On this point I give my opinion with great diffidence, as it differs from the view taken by the President of the Court, but, as the matter is of importance, and as I have come to a definite opinion on the point, I feel bound to state it.

The various cases that thus arise are exhaustively dealt with in the case of *Colonial Bank of Australasia v. Willan*.<sup>(1)</sup> Speaking for myself, I am of opinion that the present case comes within the third class spoken of on p. 444 of the report, namely, cases in which the judge of the inferior Court, having legitimately commenced the inquiry, is met with some fact which, if established, would oust his jurisdiction and place the subject-matter of the inquiry beyond it. Here the fact that the applicants were not the real

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(1) L. R. 5 P. C. 417.

C. A. resident holders of the beerhouses, and were not persons keep-  
 1906 ing or intending to keep the alehouses, excluded them from the  
 REX class to whom licences, whether absolute or conditional, could be  
 c. granted by the magistrates, and no erroneous decision of this  
 WOODHOUSE. question of fact by the magistrates could give to them jurisdic-  
 Fletcher tion. The well-known passage from the decision in *Bunbury v.*  
 Moulton L.J. *Fuller* (1), quoted with approval by Blackburn J. in *Pease v.*  
*Chaytor* (2), appears to me to be applicable to this case, and to  
 shew that, even if the licensing magistrates in this case did in  
 fact decide these points of fact, it is the duty of the Court to  
 review their decision, and, if it is erroneous, to quash the licences  
 and references. Otherwise we should have a body of limited  
 jurisdiction empowered by an erroneous decision of its own to  
 extend its jurisdiction without the possibility of a true appeal,  
 seeing that, although the confirming authority may refuse to  
 confirm the licence on any ground, it can only so do on the  
 terms of granting full compensation. But the case is still  
 stronger, if, as I am of opinion was the case here, the magis-  
 trates never really considered or decided these questions of fact,  
 and never asked themselves whether those applications were  
 made by persons to whom they were empowered to grant  
 licences, but acted in the belief that all they were doing was  
 pure formality, useful only for the purpose of enabling the  
 adjudication on the merits to be made elsewhere.

I am therefore of opinion that the rule for a certiorari should  
 be made absolute, and that the provisional licences granted and  
 the references to the confirming authority should be quashed.

With regard to the application for a mandamus I have nothing  
 to add to what has been said by the President of the Court.

*Appeals allowed.*

*Danckwerts, K.C.*, for the appellants, applied for costs of the  
 proceedings for a certiorari and for a mandamus in the Court  
 below and of the appeal against the respondents, the corporation  
 of Leeds.

*Scott Fox, K.C.*, for the respondents, objecting that the Court  
 had no power to give costs to a successful applicant for a certiorari,

the argument of the point was adjourned to afford counsel an opportunity of looking into the authorities.

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May 31. *Scott Fox, K.C.*, for the respondents. There was no power to award costs to a successful applicant for a certiorari under the old law prior to the Judicature Act, 1873, and neither under that Act nor any of the subsequent Acts has such power been given. Costs at common law, generally speaking, depend upon statute. The only power to give costs in proceedings, apart from statute, was, as against an unsuccessful applicant by virtue of the inherent jurisdiction of the Court, or where recognizances to pay costs had been entered into by the applicant. The case of *London County Council v. Churchwardens, &c., of West Ham* (1), in the Court of Appeal, is an authority directly to the effect that the practice in this respect remains unaltered by the Judicature Act. It was held in that case that s. 5 of the Judicature Act, 1890, must be read as limited by s. 4, which preserves the old practice on the Crown side of the Queen's Bench Division. [He also cited *In re Mills' Estate* (2); *Reg. v. Parlbly* (3); *Wallace v. Allen* (4); *Reg. v. Meyer* (5); *Reg. v. Hain* (6); *Rex v. Gee*. (7)]

*Danckwerts, K.C.*, for the appellants. There is now jurisdiction to give the costs of an application for a certiorari. The case of *Reg. v. London County Justices* (8), in the Court of Appeal, established the proposition that, wherever in any kind of proceeding there was jurisdiction to give costs in any of the Courts the jurisdiction of which has been transferred by the Judicature Act to the High Court, there is now such jurisdiction in the High Court. It is true that that was a case of prohibition, but the same principle must apply in the case of certiorari. It is clear that the Court of Chancery had before the Judicature Acts jurisdiction to issue a writ of certiorari, though the exercise of that jurisdiction may not have been very frequent, and also that it exercised jurisdiction to give costs in such cases: see Bacon's Abridgment, tit. Certiorari (A); Comyns' Digest, tit.

(1) [1892] 2 Q. B. 173.

(2) (1886) 34 Ch. D. 24.

(3) [1889] W. N. 190.

(4) (1875) L. R. 10 C. P. 607.

(5) (1875) 1 Q. B. D. 173.

(6) (1896) 12 Times L. R. 323.

(7) (1901) 17 Times L. R. 374.

(8) [1894] 1 Q. B. 453.



C. A. Certiorari (A)(1.); *Edwards v. Bowen*. (1) The Court of Chancery  
 1906 always exercised in matters of equitable jurisdiction a general  
 ----- discretionary jurisdiction over costs, independently of any statu-  
 REX tory power: *Andrews v. Barnes*. (2) [He also cited on this point  
 v. *Woodcraft v. Kinaston* (3); *Atkinson v. The King* (4); *Tracy v.*  
 WOODHOUSE. *Open Stock Exchange* (5), 2 Hawkins' Pleas of the Crown, chap. 27,  
 tit. "Process," s. 22.]

It is not necessary for the applicants to pray in aid the provisions of s. 5 of the Judicature Act, 1890, and, therefore, any limitation of its effect by s. 4 is immaterial. [He also relied on *Reg. v. Jones*. (6)]

With regard to costs of the appeal, it is clear that the Court has jurisdiction to give them under s. 17 of the Judicature Act, 1875, and Order LVIII., r. 4.

*Scott Fox, K.C.*, in reply. A writ of certiorari only appears to have issued from the Court of Chancery to remove equitable proceedings: Bacon's Abridgment, tit. Certiorari (A), p. 12.

VAUGHAN WILLIAMS L.J. I am of opinion that we have power to award costs of the proceedings in the Divisional Court in this case. I think that, in the case of proceedings which were not peculiar to the Court of Queen's Bench, and in which before the Judicature Act a power to give costs existed in any of the Courts which by that Act have been embodied in the High Court, that Court has now power to give costs, assuming that that power has not been taken away by any provision in the Judicature Acts or rules. With regard to the costs of the appeal in this case, I also think that, for somewhat different, or perhaps I should say additional, reasons we can give those costs. It is impossible to say that the decisions which have been given since the Judicature Act on this matter are entirely uniform. It is quite clear that in the case of *Reg. v. Parlbby* (7) it was decided by a Divisional Court subsequently to the Judicature Act that there was no power to give costs in a case where the Court made absolute a rule for a certiorari, and that was the view acted upon in *Rex*

(1) (1826) 2 Sim. & Stu. 514; 2 Russ. 153.

(2) (1888) 39 Ch. D. 133, 138.

(3) (1742) 2 Atk. 317.

(4) (1785) 3 Brown, P. C. 517.

(5) (1870-1) L. R. 11 Eq. 556.

(6) [1894] 2 Q. B. 382.

(7) [1889] W. N. 190.

v. *Gee* (1) and *Reg. v. Hain* (2), but the case to which it is most useful to direct one's attention for the present purpose is *London County Council v. Churchwardens, &c., of West Ham* (3), which was a case in the Court of Appeal. In that case Lord Esher M.R. said, with regard to the question whether there was power to give costs in such a case: "Then came the Judicature Act, and the rules and orders, amongst others Order LXV., r. 1. The Court had, with regard to this very matter, to construe Order LXV. In the case of *In re Mills' Estate* (4) the conclusion to which the Court came was that, upon the true construction of that rule, it did not assume to give the Court power over costs, or jurisdiction over costs, where the Court had never had jurisdiction before, but it gave to the Court power to deal with costs in a particular way, different from that in which the costs had been dealt with before in cases where the Courts had jurisdiction over the costs. That altered the practice, but it did not enlarge the jurisdiction. There were doubts expressed in some quarters about that rule and order, and the Legislature, in the statute 53 & 54 Vict. c. 44, put the matter beyond doubt by an enactment which gives a statutable rule to the same effect as that order; but it seems to me obvious that the Legislature in 1890, when they passed that Act, knew of the limitation on the generality of the words of Order LXV., which had been put on them by the Court, and adopted that limitation. The way they adopted that limitation was by using the general words of the order in s. 5 of the statute, but also taking out from the generality of the words in s. 5 the matters which are dealt with in s. 4. The true construction of ss. 4 and 5 is this, that s. 5 is a general enactment, and s. 4 has the effect of a proviso on the generality of the words in s. 5." Now s. 4 of the Act of 1890 provides that "Nothing in this Act shall alter the practice in any criminal cause or matter, or in bankruptcy, or in proceedings on the Crown side of the Queen's Bench Division"; and s. 5 provides that "Subject to the Supreme Court of Judicature Acts and the rules of Court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this Act, the costs

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(1) 17 Times L. R. 374.

(3) [1892] 2 Q. B. 173.

(2) 12 Times L. R. 323.

(4) 34 Ch. D. 24.

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of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the Court or judge, and the Court or judge shall have full power to determine by whom and to what extent such costs are to be paid." Lord Esher, after calling attention to those provisions, goes on: "Then the whole question will be whether this case comes within the words of s. 4. The expression 'nothing in this Act' includes s. 5. It has been argued that these words apply to the preceding sections only; but that would be to read in the word 'hereinbefore.' That is, to add words to the section, which we are not allowed to do"; and the ultimate result of his judgment was that there was no power to give costs. It seems to me clear from the judgment of Lord Esher that he took the same view as Lopes L.J. did in that case, though he did not deal with the matter in such detail. Fry L.J. agreed, and then Lopes L.J. dealt with the matter in the most specific way. He said: "In former times a case like this would have been brought up by a certiorari. The certiorari has been dispensed with by Act of Parliament, and, therefore, is no longer necessary; but the case stands in precisely the same position as if it had been brought up by certiorari." Therefore, the judgment is given on the same basis as if the case had been so brought up. The Lord Justice proceeded: "What would have been the state of things if it had been brought up by certiorari? There would have been no inherent or original jurisdiction in the Courts to deal with costs. The only jurisdiction they would have would be under a statute or under the recognizances. There is no jurisdiction by any statute; therefore it follows that the only jurisdiction to deal with costs would be under the recognizance. But then the recognizance only applies where the order is affirmed. If the order is affirmed, the successful party obtains costs under the recognizance; if the order is quashed there are no costs. That was the state of things before the Judicature Acts. In my opinion the Judicature Acts have introduced no change. I entirely agree with the statement of the law in this respect made by Master Mellor, and referred to by Huddleston B., in *Reg. v. Parlbby*. (1) I also entirely agree

with—and I think it worth while to read—what was said by Cotton L.J. in *In re Mills' Estate*.” (1) The Lord Justice then read a passage from the judgment of Cotton L.J. in that case, and he concluded by saying: “Therefore it appears that things are precisely as they were previously to the passing of the Judicature Acts. If it were necessary to fortify that view, it seems to me that it is strongly fortified by s. 4 of the Act of 1890.” It is therefore plain that, as regards the authorities up to the date of that case, they tended to shew that, so far as the King's Bench Division was concerned, according to the practice there was no power to give costs in such a case. But there is a case of great importance as bearing upon the question, which was subsequently decided in the Court of Appeal, namely, the case of *Reg. v. London County Justices*. (2) Among the judges who decided that case was Lopes L.J., who had given the judgment to which I have just referred. That was a case of prohibition. I will call attention to it more particularly presently, but, in substance, the basis of the judgment was that, wherever prior to the Judicature Act any Court whose jurisdiction was transferred by that Act to the High Court had power to give costs in a particular kind of proceedings, then, unless some statutory enactment had taken away that power, it could be exercised by the High Court; and it was pointed out that a writ of prohibition might have been issued by the Court of Chancery, and that in such a case that Court would have had power to give costs; and therefore, notwithstanding the decision in *London County Council v. Churchwardens, &c., of West Ham* (3), it was held that the High Court had power to deal with the costs. It is plain that the same reasoning applies to proceedings for a certiorari, for it was not seriously contested that a writ of certiorari could have been issued by the Court of Chancery, and that that Court would have had power to deal with the costs of proceedings for such a writ in its discretion; and, if that be so, clearly the judgment delivered in *Reg. v. London County Justices* (2) applies in principle just as much to the case of a certiorari as to that of a prohibition. This view was put very

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(1) 34 Ch. D. 24.

(2) [1894] 1 Q. B. 453.

(3) [1892] 2 Q. B. 173.



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plainly and forcibly both by Cave J. and Collins J. in the case of *Reg. v. Jones*. (1) They had before them the case of *London County Council v. Churchwardens, &c., of West Ham* (2), and they nevertheless took the view, in the case of an application for a habeas corpus, that the principle of *Reg. v. London County Justices* (3) ought to be applied, and that they had power on granting the writ to give costs against the defendant. I do not know that I can do better than to read some passages from the judgment of Collins J. in that case. He said: "The question is whether s. 5 of the Supreme Court of Judicature Act, 1890, gives us power to order payment of costs. I am of opinion that it does. I think it gives the power, unless the case is taken out of the operation of s. 5 by the provisions of s. 4. The terms of s. 5 are general, 'the costs shall be in the discretion of the Court.' Sect. 4 provides that 'nothing in this Act shall alter the practice in any criminal cause or matter, or in bankruptcy, or in proceedings on the Crown side of the Queen's Bench Division.' If habeas corpus could only be obtained on the Crown side of the Queen's Bench Division, those provisions would come in, and the case of *London County Council v. Churchwardens and Overseers of West Ham* (2) would apply. But these proceedings could be taken in other Courts. Then does s. 5 confer jurisdiction to deal with costs? I think it does." Then he deals with *In re Mills' Estate* (4), and proceeds as follows: "The effect in cases of prohibition is stated by Kay L.J. in *Reg. v. Justices of County of London and London County Council* (5), where he says: 'I have come to the conclusion that the High Court in cases of prohibition, which is not a jurisdiction peculiar to the Crown side of the Queen's Bench, has all the jurisdiction as to costs formerly exercised by the Courts of Chancery, Common Pleas and Exchequer; and that, as these last-mentioned Courts seem to have had and exercised jurisdiction to give costs against the defendant when granting a prohibition, the High Court now has a like jurisdiction.' The same reasoning applies to habeas corpus, and it follows that we have jurisdiction to order payment of costs in the present

(1) [1894] 2 Q. B. 382.

(3) [1894] 1 Q. B. 453.

(2) [1892] 2 Q. B. 173.

(4) 34 Ch. D. 24.

(5) [1894] 1 Q. B. 453, at p. 461.

case." It seems to me that this statement of the learned judge accurately expresses the effect of the decision in *Reg. v. London County Justices* (1), and we ought to act on the principle laid down in that case; and, therefore, if we are satisfied that in cases of certiorari the jurisdiction to give costs was formerly exercised by the Court of Chancery, we can and ought to say that it can be exercised by the High Court now. I quite agree that our decision cannot be reconciled with the decision in *London County Council v. Churchwardens, &c., of West Ham* (2). But that case is not, as it seems to me, really consistent with the principle laid down in *Reg. v. London County Justices* (1), and we have now to say upon which of the two decisions we ought to act. In my judgment we ought to act upon the decision in *Reg. v. London County Justices*. (1) When one looks at the judgments in that case, I must say that, as far as Lopes L.J. and Kay L.J. were concerned, I do not think that either of those learned judges quite appreciated that that judgment would render it impossible in future to act upon *London County Council v. Churchwardens, &c., of West Ham*. (2) I do not think that in that case it was brought to the attention, or was present to the minds, of the Court, that, in cases of certiorari as well as in cases of prohibition, the Court of Chancery had jurisdiction to deal with the costs. Under these circumstances I think that we have power to award costs and ought to award the appellants the costs of the proceedings in the Court below.

With regard to the costs in the Court of Appeal, I think that there are reasons why under the Judicature Acts we should decide that we have power to grant those costs, independent of the reasons which I have given with regard to the jurisdiction of Courts which are now embodied in the High Court. I do not think it is necessary to go into detail on this subject. It is sufficient, I think, to say that there are reasons, when the Acts and rules are looked at, why the Court of Appeal should have jurisdiction to give those costs beyond those which apply to the costs in the High Court.

STIRLING L.J. I agree, and will add only a very few words. I think that the case of *London County Council v. Churchwardens, &c., of West Ham* (2) decided two things: first, that the High Court does not derive from the old Court of Queen's Bench any

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(1) [1894] 1 Q. B. 453.

(2) [1892] 2 Q. B. 173.

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jurisdiction to award costs on making a rule for a certiorari absolute; secondly, that the High Court does not, regard being had to s. 4 of the Supreme Court of Judicature Act, 1890, possess under s. 5 of that Act any jurisdiction to award such costs. I do not think that the decision really goes any farther than that. It was subsequently decided in *Reg. v. London County Justices* (1), with regard to a prohibition, that, although no jurisdiction was derived from the old Court of Queen's Bench to award costs against the defendant, yet, inasmuch as such a writ could have issued out of the old Court of Chancery, and that Court had full jurisdiction to deal with the costs in such cases, and the whole jurisdiction of the Court of Chancery was by the Judicature Act vested in the High Court, that Court in that way had jurisdiction to deal with the costs in the case of a prohibition. That point was never really dealt with in the case of *London County Council v. Churchwardens, &c., of West Ham*. (2) We have to consider whether the same principle applies to the case of a certiorari. Now, a certiorari, according to the books, could be issued from the Court of Chancery as well as from the Queen's Bench. Proceedings both for prohibition and certiorari were no doubt infrequent in the Court of Chancery, but the jurisdiction of that Court to grant both writs existed, and is treated of in Daniel's *Chancery Practice* (3), and there were forms of orders applicable both to prohibition and certiorari in *Seton on Decrees*. (4) I am unable to see on what general principle the case of certiorari can differ for the present purpose from that of prohibition, and it appears to me that we ought to follow the principle laid down in *Reg. v. London County Justices* (1), though I think that it was not present to the minds of the judges who decided that case that a certiorari could be obtained in the Court of Chancery.

As regards the costs of the appeal, it seems to me that, when one looks at the provisions of the Judicature Act of 1875, and the rules, it is apparent that the Court has full power to deal with those costs. Sect. 17 of the Judicature Act, 1875, provides for the making of rules for, amongst other

(1) [1894] 1 Q. B. 453.

tice, 7th ed., pp. 1391, 1628.

(2) [1892] 2 Q. B. 173.

(4) See *Seton on Judgments and*

(3) See Daniel's *Chancery Prac-*

*Orders*, 5th ed., pp. 817, 837.

things, "regulating the pleading, practice, and procedure in the High Court of Justice and the Court of Appeal; and generally for regulating any matters relating to the practice and procedure of the said Courts respectively, or to the duties of the officers thereof, or of the Supreme Court, or to the costs of proceedings therein." These rules are to be laid before each House of Parliament, and all rules of Court made in pursuance of this section are to regulate all matters to which they extend, until annulled or altered in pursuance of the section. By virtue of the power conferred by that section rules have been made with respect to the procedure on appeals, and empowering the Court of Appeal to deal with the costs of an appeal, which, as it appears to me, enable the Court to grant costs in such a case as the present.

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FLETCHER MOULTON L.J. I am of the same opinion. As regards the costs in the High Court, I base my decision on the short ground that before the Judicature Act the Court of Chancery had power to give costs in cases of certiorari, and this power has been transferred to the High Court. I think that, if this had been called to the attention of the Court in *London County Council v. Churchwardens, &c., of West Ham* (1), the decision in that case would have been different from that which was actually given. The Act of 1890 was not required to give this jurisdiction to the High Court, because it already possessed it, and the decision of the Court of Appeal to the effect that s. 5 of the Act of 1890 did not give such jurisdiction does not really conflict with our decision in the present case.

As regards the costs of the appeal, I can see no difference between this appeal and any other appeal brought before this Court. The Court of Appeal was created by the Judicature Act, and power has been given to it to deal with the costs of appeals; and that power seems to me to apply in this case just as much as in the case of any other appeal.

*Order for costs accordingly.*

Solicitors for the appellants: *Goddén, Son & Holme, for Simpson, Thomas & Co., Leeds.*

Solicitors for the respondents: *King, Wigg & Co., for Fox, Leeds.*

(1) [1892] 2 Q. B. 173.

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June 26.

[IN THE COURT OF APPEAL.]

## BENTLEY BROS. v. METCALFE &amp; CO.

*Landlord and Tenant—Landlord's Liability—Room in Mill let with Machine—Contract to supply Power to work Machine—Implication of Reasonable Fitness for Purpose—Excessive Supply causing Damage.*

The defendants were tenants of a mill, and they let to the plaintiffs, under an oral contract, a room in the mill with the machine therein, and agreed to supply power for the working of the machine. The power was supplied by an engine upon the premises, and owing to a defect in the governor of this engine, it ran at an excessive speed, and caused the drum of the machine in the plaintiffs' room to revolve at such a speed that it burst, and killed a workman of the plaintiffs' who was working the machine. The plaintiffs paid compensation to the widow of the workman. In an action to recover from the defendants the amount that the plaintiffs had been obliged to pay and the costs incurred by them:—

*Held*, that the obligation of the defendants to supply power did not arise upon a demise, but upon a specific contract which involved, in the absence of special conditions, that the power supplied should be reasonably fit for the purpose for which it was supplied, and that the defendants were liable for the consequences of a breach of that contract.

APPLICATION on behalf of the defendants for a new trial, or that judgment should be entered for them, in an action tried before Darling J. with a jury.

The statement of claim alleged, and the defence admitted, that the defendants were occupiers of mills, and that the plaintiffs were tenants of the defendants, under a verbal agreement whereby the defendants let to the plaintiffs, for the purposes of their trade as mungo manufacturers, certain rooms at the mills with the rag machine therein, and agreed to supply power for the working of the machine, at a yearly rental of 100*l*. The power was supplied by an engine which was on the premises, and the statement of claim alleged that it was the duty of the defendants to provide an engine for the supply of power to the plaintiffs, which would be fit and proper for that purpose, and to maintain and keep it in such condition, and breach of that duty, resulting in the death of Dews, a workman of the plaintiffs, engaged in working their rag machine.

It appeared that from some defect in the governor of the

engine it ran at an excessive speed, the effect of which was to cause the drum of the plaintiffs' machine, at which Dews was working, to revolve at so high a rate of speed that it burst into pieces, one of which struck and killed him. By an award under the Workmen's Compensation Act, 1897, the plaintiffs paid to the widow of Dews a sum of money as compensation, which with the costs of the proceedings made up a total of 202*l.*, which the plaintiffs claimed as damages for the negligence of the defendants, or as damages for a breach of their implied warranty that the power provided by them for the purpose of working the plaintiffs' machine would be at all times reasonably fit and proper for the working of that machinery. There was also an alternative claim for damage caused by the act of the defendants in keeping on their premises and working an engine which they knew to be dangerous, and which caused the death of Dews, and the liability on the part of the plaintiffs to pay compensation and costs.

The learned judge at the trial left to the jury certain questions, among them being—

(1.) Was it the duty of the defendants to provide an engine for the supply of power to the plaintiffs which would be fit and proper for its purpose, to maintain and keep it so, and so to manage and control the engine that it should be run with safety to the plaintiffs' workmen? Answer: Yes.

(2.) If yes, did the defendants fail to fulfil that duty. Answer: Yes.

(3.) Did the defendants know that the engine was in such condition as when worked to be dangerous to the plaintiffs' workmen? Answer: No, but the jury are of opinion that the defendants knew that the engine was not satisfactory.

(5.) Was the engine fit and proper for the working of the plaintiffs' machinery. Answer: No, the governor being defective.

(6.) If no, was such unfitness the cause of Dews' death. Answer: Yes, indirectly.

The learned judge directed that judgment should be entered for the plaintiffs for the amount claimed.

The defendants appealed.

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*Scott Fox, K.C., and J. A. Compston*, for the defendants. This was a case in which there was an engine for the common use of all the occupiers of the factory, and no contract can be implied that it should be in perfect order. The cases shew that no such contract is to be implied on the part of a landlord who lets a room in a house in which there is something to be used for the common benefit of both parties: *Carstairs v. Taylor* (1); *Ross v. Fedden* (2); *Anderson v. Oppenheimer* (3); *Blake v. Woolf*. (4) No negligence can be charged against the defendants, for the engine was put in by the superior landlords, and was attended to from time to time by competent persons by their order. The engine was unsatisfactory from the first, but was not known to be dangerous. There can be no larger obligation on the defendants than that they should take reasonable care and that they did, and no warranty can be implied on their part that the building or the engine in it were absolutely safe: *Searle v. Laverick*. (5) They were in the position of tenants to a superior landlord, and in the absence of any special bargain the question is what they could reasonably be asked to do. It is not disputed that the plaintiffs were entitled to sufficient power to work their machine, but that falls far short of a guarantee that there shall be no breakdown. The plaintiffs accepted a demise of the room, the machine in it, and the power to work that machine, and in the absence of any stipulation as to condition they took all that was covered by the demise with all defects: *Robertson v. Amazon Tug and Lighthouse Co.* (6)

The power to be supplied to the plaintiffs was to be generated by the engine which was on the premises, and they hired the room with full knowledge that this was so. If they were dissatisfied it was open to them to give up their tenancy, but they cannot complain of the condition of the engine, which was known to them. The learned judge cannot have been right in putting the first question to the jury, and their answer should be disregarded, for the only answer in law would be a negative.

*Tindal Atkinson, K.C., and A. P. Longstaffe*, for the plaintiffs.

(1) (1871) L. R. 6 Ex. 217.

(2) (1872) L. R. 7 Q. B. 661.

(3) (1880) 5 Q. B. D. 602.

(4) [1898] 2 Q. B. 426.

(5) (1874) L. R. 9 Q. B. 122.

(6) (1881) 7 Q. B. D. 598.

The contract was for a demise of a portion of the building and the power was not covered by the demise, but was merely ancillary, as pointed out by Willes J. in a similar case: *Selby v. Greaves*. (1) The contract was a general one to supply power to work the plaintiffs' machine, and there was no evidence that this particular engine was to supply the power. That was a matter entirely in the control of the defendants, who might have substituted another engine, and consequently the plaintiffs cannot be treated as affected with the knowledge of the defects of the engine. The case, therefore, stands as a contract, that power should be supplied which was reasonably fit to drive the machine which was let with the room, and any obligation on the plaintiffs to take the risks arising from the condition of the engine which was actually used is negatived. Cases that did not arise on contractual relations between the parties are not material to a decision in this case. The answers of the jury to the questions left to them establish knowledge of the defendants that the machine was not fit and proper for the working of the plaintiffs' machinery, and as such a machine must be tended by a workman, the injury sustained by the man who was working it was the natural consequence of the excess of power which caused the accident.

*Scott Fox, K.C.*, in reply. It is incorrect to treat that which is called "power" as a chattel. The defendants did not agree to supply any chattel, but to do certain work, that is, to allow power from this engine to pass to the plaintiffs' room, and turn their machine. The case resembles that of the supply of labour, in which case, if damage were done by the labourer, the person who sent him would not be liable without negligence on his part. There was no evidence of negligence on the part of the defendants, and though bound to take reasonable care, they were not in the position of insurers against accident.

*Collins M.R.* This is an appeal from a judgment of Darling J. on the answers to certain questions submitted to the jury.

There is no dispute between the parties as to the contract between them. The plaintiffs agreed to become tenants of a

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(1) (1868) L. R. 3 C. P. 594, at p. 602.



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room in a factory in which there was an engine, which was used to actuate the machinery in the building, including a machine in the room let to the plaintiffs, and the defendants agreed to supply power for the working of that machine. The question is whether the plaintiffs can make out that the defendants are liable for an accident to one of the plaintiffs' workmen, which arose from the power which worked their machine doing so in such a violent manner and at such a velocity that the drum was burst and the workman was killed by being struck by one of the pieces. The plaintiffs were liable, as employers, to pay compensation to the widow of the workman, and this action is brought to recover as damages for which the defendants are liable the sum that the plaintiffs had to pay as compensation, and the costs that they incurred. Certain questions were left by the learned judge to the jury, and upon the answers to those questions judgment was entered for the plaintiffs.

It is common ground that the defendants agreed to supply power for working the particular machine hired, with the room in which it was, by the plaintiffs, and the question is what was the extent of the obligation that was upon the defendants. If it was to supply power reasonably adequate for the working of the machine and no more, it is clear that they supplied power in excess, and prima facie that involved a breach of their contract. From this point of view the obligations upon the defendants did not arise as incidents of a demise of property, but arose out of a specific contract to supply power. The result of such a contract, whether it relates to gas, electricity or any other motive power is the consumption of that which is supplied. Such a contract is in fact one of purchase and sale. It may be difficult to describe in precise terms the thing that is bought, but that does not alter the fact that there is a sale. Counsel for the defendants contended that the discussion ought to be commenced as if there were a demise, and that in the absence from the contract of a special agreement as to the condition of the thing demised, the presumption is that it is to be taken tale quale. In this case he urged that the machine used by the plaintiffs was part of the thing demised, and that the power that actuated it ought to be dealt with on the same

footing, and treated as part of the subject-matter of the demise, and must therefore be taken with all its defects. This seems to me to be a misapprehension of the real nature of the bargain, which was, as I have indicated, for the sale of a subject-matter called "power," and the obligation upon the seller was that the power that he supplied should be reasonably fit for the purpose for which it was to be supplied. There was abundant evidence that this obligation was not carried out, and that the power supplied was not reasonably fit to work the plaintiffs' machine. There was also evidence that the damage sustained by the plaintiffs was the natural consequence of the defendants' default. Under these circumstances judgment was properly entered for the plaintiffs, and the application for a new trial must be dismissed.

COZENS-HARDY L.J. I am of the same opinion. In the discussion of this case points of some difficulty have been raised, but they have been disposed of by the arguments presented on behalf of the plaintiffs. It is admitted by the defendants that the relation of landlord and tenant existed between the plaintiffs and themselves with regard to a room in the factory and a machine in that room, and that they agreed to supply power for working the machine. A contract for the supply of power for such a purpose is not in the nature of a demise. It is a contract to supply something for a particular purpose, and that which is supplied must be fit and proper for use. It is said that power is not a chattel, but it is not material to consider that matter, because, whether it be work and labour or a chattel, it is, at any rate, something that is not returnable to the vendors. That which is supplied is destroyed in the user of it, and there is in fact a purchase of something, whatever it may be called, and it seems to me that the principle which governs the relation of the parties upon a purchase and sale, that the article bought should be fit and proper for the purpose for which it is to be used, is equally applicable to the supply of power. I think therefore that the verdict was right, and that the application for a new trial should be refused.

SIR GORELL BARNES, PRESIDENT. The question is what inference is to be drawn from the contract between these parties

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that has been proved in this case. It is a verbal contract, and does not provide for various contingencies that might arise. What is the true implication that should be made upon a contract such as this for the supply of power to be used to run a machine? In the first place, the evidence in this case does not show any contract restricting the source from which power was to be supplied to any particular engine, and consequently there is a contract in general terms for the supply of power to work the machine hired to the plaintiffs. It seems to me that the implication in such a case is similar to that which arises on the supply of any chattel or other article, which is that the chattel or article supplied should be reasonably fit for the purpose for which it is supplied. So here, the power supplied ought to have been reasonably fit to work the plaintiffs' machine. That it was not so is clear, for there was an excess of power which caused the drum of the machine to revolve at an excessive speed, and resulted in the disaster which rendered the plaintiffs liable to pay compensation. Even if it could be said that the power was to be supplied from the particular engine which was on the premises at the time when the contract was made, it would not necessarily follow that the implication that I have indicated would be lessened, for the inference to be drawn would still be that the power supplied from that engine should be such as was reasonably necessary for the working of the plaintiffs' machine. I agree, therefore, that the appeal should be dismissed.

*Appeal dismissed.*

Solicitors for the plaintiffs: *Jaques & Co., for W. Brook, Ossett.*

Solicitors for the defendants: *Gribble, Oddie & Co., for Stewart & Chalker, Wakefield.*

A. M.

[IN THE COURT OF APPEAL.]

C. A.

GRUNNELL *v.* WELCH.

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July 10.

*Landlord and Tenant—Distress—Trespass ab Initio—Second Distress for same Rent.*

A bailiff, employed to levy a distress for rent in arrear, illegally broke in the front door; he then seized the furniture, but before selling it left the house, and, being refused admittance on his return, made no attempt to regain possession. Subsequently the landlord put in a fresh distress in respect of the same rent by a different bailiff acting under a fresh distress warrant, who seized the furniture, which was replevied before sale by the owner:—

*Held*, that the proceeding under the first distress warrant was a trespass ab initio and void as a distress, and that the landlord, having had no opportunity of satisfying his claim for rent by means of that proceeding, could lawfully distrain under the second warrant for the same rent.

Decision of the Divisional Court, reported [1905] 2 K. B. 650, affirmed.

APPEAL from the judgment of a Divisional Court (Kennedy and Ridley JJ.) (1) on an appeal from the decision of the judge of the Waltham Abbey County Court in an action of replevin.

The plaintiff was the wife of the tenant of a house which had been let to her husband by the defendant, and in respect of which two quarters' rent were in arrear and owing at Midsummer, 1904. On July 19 a distress for the rent was put in by the defendant. The bailiff entered the house by forcibly breaking the chain of the front door, and seized furniture which admittedly belonged to the plaintiff; except for the illegality of the original entry the whole of the bailiff's proceedings were in order. The bailiff remained in possession until July 30, on which day he left the house for two hours, and on his return was refused admission. He made no attempt to resume possession, but went away and did not return. On August 5 a fresh distress for the same rent was levied by a different bailiff under a fresh distress warrant. Of the goods seized some had and some had not been seized on the previous occasion. The furniture was removed and advertised for sale, whereupon the plaintiff took the necessary steps to replevy her goods, and in due course brought the present

(1) [1905] 2 K. B. 650.



C. A.      action of replevin in the county court. The county court judge  
1906      held that the first proceeding was, upon the authority of *Attack*  
GRUNNELL      v. *Bramwell* (1) a trespass ab initio and void as a distress, and  
v.      that the subsequent distress for the same rent was lawful. On  
WEICH.      appeal to the Divisional Court his decision was affirmed.

The plaintiff appealed.

*Foà*, for the plaintiff. The case of *Attack v. Bramwell* (1) on which the county court judge and the Divisional Court relied, is not an authority for holding that the first entry was void as a distress and was a trespass ab initio, and that the second distress was therefore good. The decision in *Attack v. Bramwell* (1) turned on an entirely different point, and is not applicable to the facts of the present case. No question arose there as to a second distress. There had been an illegal entry by a bailiff for which the landlord was undoubtedly liable, and it was contended that the landlord was entitled to deduct from the damages payable by him to the tenant the amount of the rent owing. The Court held that he could not do so; and, although there are expressions in the judgments to the effect that the distress was void, the judges did not, it is submitted, mean that the distress was a mere nullity, but that it was ineffectual for the purpose of enabling the landlord to realize his rent. The word "void" was there used in the same sense as the word "avoided" is used in the preamble to s. 19 of 11 Geo. 2, c. 19. It appears from the reports of *Attack v. Bramwell* (1) in the *Law Journal* and the *Weekly Reporter* that no sale had taken place, the landlord having merely taken possession of the goods seized, but if he had in fact sold them he would have been entitled to pay himself the rent out of the proceeds. Where a bailiff enters and seizes goods in pursuance of an intention to distrain, although the entry may in the circumstances be illegal, his acts nevertheless constitute a distress. That this is so is clear from the fact that after the goods have been impounded the tenant cannot retake them, even though the distress is illegal: Co. Litt. 47 b. Further, if the original proceedings in the present case were not a distress, it follows that in any case where there was some

(1) (1863) 3 B. & S. 520; 32 L. J. (Q. B.) 146; 11 W. R. 309.

illegality committed in the course of the entry a purchaser of the goods seized would not acquire a title, for the title of the purchaser depends on 2 W. & M. sess. 1, c. 5, s. 2, which only authorizes a sale where there has been a distress; but no authority can be found of an action being brought against a purchaser in these circumstances. If an illegal entry renders all the subsequent proceedings void as a distress for all purposes, one would have expected to have found the same result if an illegal entry were effected by a sheriff in order to levy a *fi. fa.*, but it is clearly established by the fourth resolution in *Semayne's Case* (1) that, although the sheriff is in those circumstances a trespasser, the execution itself is good. There can be no reason why a different principle should apply in the case of a distress. The judges in the Divisional Court were of opinion that the rule as to no second distress for the same rent did not apply here because the defendant could not have satisfied the arrears of rent out of the first distress. This is not so. Although the defendant was liable to an action for damages for the illegal entry he might have remained in possession and sold the goods and thus realized the rent. But, however this may be, a second distress is always bad if the failure of the first is, as in this case, due to the landlord's own default. This point does not appear to have been considered in *Bagge v. Mawby* (2), which was relied on in the Court below. [He also referred to *Keen v. Priest*. (3)]

In any event, the defendant is estopped from setting up his own illegal act as a defence to this action. Kennedy J. said that it was the plaintiff, not the defendant, who was setting up the previous proceedings. The plaintiff was not bound to allege that the previous proceedings were either legal or illegal, but merely that there was a proceeding in the nature of a distress, and that there were sufficient goods to satisfy it: Bullen & Leake, 3rd ed. p. 317. It is the defendant who is compelled to allege, by way of answer to the plaintiff's claim, that the previous act was not a distress, but was a mere illegality or trespass. This brings the case within the principle laid down by Jessel M.R. in

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(1) (1605) 1 Sm. L. C., 11th ed.  
p. 104.

(2) (1853) 8 Ex. 641.

(3) (1859) 4 H. & N. 236.

C. A. *In re Hallett's Estate* (1), where he said: "Where a man does an  
 1906 act which may be rightfully performed, he cannot say that that  
 GRUNNELL act was intentionally and in fact done wrongly. A man who has  
 r. a right of entry cannot say he committed a trespass in entering."  
 WELCH. *Morle* (*Morton Smith* with him), for the defendant, was not  
 called upon to argue.

LORD ALVERSTONE C.J. I am of opinion that this appeal wholly fails, and I have nothing to add to the judgments delivered by Kennedy and Ridley JJ. in the Divisional Court.

SIR GORELL BARNES, PRESIDENT, and FARWELL L.J. concurred.

*Appeal dismissed.*

Solicitors for plaintiff: *Lumley & Lumley.*

Solicitors for defendant: *Avery & Son.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.  
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 July 25.

NEALE v. ELECTRIC AND ORDNANCE ACCESSORIES  
 COMPANY, LIMITED.

*Employer and Workman—Workmen's Compensation—Infant Workman—  
 Injury to Workman—Action against Employer, Failure of—Assessment of  
 Compensation by the Judge—Estoppel—Workmen's Compensation Act, 1897  
 (60 & 61 Vict. c. 37), s. 1, sub-ss. 2 (b), 4.*

Where, upon the dismissal of an action brought by a workman under age, by his next friend, against his employers to recover damages in respect of personal injuries occasioned to the plaintiff by an accident arising out of and in the course of his employment, an application was made to the judge who tried the action to assess compensation to the plaintiff under the Workmen's Compensation Act, 1897, s. 1, sub-s. 4, and the judge accordingly awarded such compensation:—

*Held*, that the plaintiff was estopped by the election to take such compensation and the award thereupon made from proceeding further

with the action, and therefore a subsequent application by him for judgment or a new trial in the action could not be entertained.

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*Isaacson v. New Grand (Clapham Junction), Ltd.*, [1903] 1 K. B. 539, discussed.

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APPLICATION for judgment or a new trial in an action tried by Ridley J. with a jury.

The action was brought by an infant, by his next friend, to recover damages for personal injuries. The plaintiff, a boy about fifteen years of age, while in the employ of the defendants sustained personal injury by losing his left hand through an accident arising out of and in the course of his employment, which he alleged to have been caused by the defendants' negligence, or, alternatively, through breach by them of the duty to fence dangerous machinery imposed upon them by the Factory and Workshop Act, 1901.

At the trial the jury found a verdict for the defendants, and the judge accordingly gave judgment for them dismissing the action. The plaintiff's counsel thereupon applied to the judge to assess compensation under the Workmen's Compensation Act, 1897, in accordance with s. 1, sub-s. 4, of that Act. The judge accordingly proceeded to assess such compensation at the amount of 3s. 6d. a week, and gave a certificate of the compensation so awarded. No payments had been actually received by the plaintiff in respect of the compensation so awarded. The plaintiff subsequently gave notice to the defendants of his intention to apply to the Court of Appeal for judgment or a new trial in the action.

*R. B. D. Acland, K.C.* (*E. W. Cave* with him), for the defendants, took a preliminary objection to the application. The plaintiff, having, in the exercise of the option given to him by the Workmen's Compensation Act, 1897, s. 1, sub-s. 4, elected, on failing at the trial upon the claim made in the action, to apply to the judge for an assessment of compensation under that Act, and having obtained an award of such compensation, upon which he can issue execution, is now estopped from proceeding further with the action. [He cited *Edwards v. Godfrey* (1); *Isaacson v. New Grand (Clapham Junction), Ltd.* (2)]

(1) [1899] 2 Q. B. 333.

(2) [1903] 1 K. B. 539.



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*McCardie*, for the plaintiff. This case is substantially covered by the decision of the Divisional Court in *Isaacson v. New Grand (Clapham Junction), Ltd.* (1) There the plaintiff, having brought an action in the county court under the Employers' Liability Act, 1880, which was dismissed, thereupon applied to the county court judge to assess compensation under the Workmen's Compensation Act, 1897, and it was held that the making of that application did not amount to the exercise of an option on the part of the plaintiff so as to estop him from appealing against the dismissal of the action under the Employers' Liability Act. In that case it is true that the county court judge refused to award compensation on the ground that the premises on which the accident happened were not a factory, whereas in the present case the judge awarded compensation, but it does not constitute a material distinction between the two cases that in *Isaacson v. New Grand (Clapham Junction), Ltd.* (1) the application for compensation failed. Such an application made with the result that the judge decides in its favour ought not to be regarded as a conclusive election operating as an estoppel any more than such an application made with the result that the judge decides against it. If one does not constitute a *res judicata* for this purpose, neither ought the other. No doubt the workman cannot ultimately be entitled to receive compensation both under the Workmen's Compensation Act, 1897, and in an action, but the award of compensation may be treated as provisional, and, if a new trial were granted, the award would of course become of no effect. The effect of the decision in *Edwards v. Godfrey* (2) is that the workman really has, if he fails in the action at the trial, no option but to apply at once for compensation under the Workmen's Compensation Act, 1897, and therefore his doing so cannot fairly be treated as a conclusive election to claim under that Act. The option mentioned in s. 1, sub-s. 2 (b), of the Workmen's Compensation Act, 1897, refers to a stage antecedent to that to which sub-s. 4 refers. The option there contemplated is the option to be exercised in the first instance by the workman as to whether he will proceed by way of action or by way of claim under the Act. The application and

(1) [1903] 1 K. B. 539.

(2) [1899] 2 Q. B. 333.

award under sub-s. 4 do not operate as a final election, but merely as a proceeding taken provisionally upon the assumption that the action will ultimately fail. In the Irish case of *Beckley v. Scott* (1) the decision in *Edwards v. Godfrey* (2) was not followed.

It is submitted, further, that, the plaintiff being an infant, the Court must be satisfied that the option was exercised for the infant's benefit, or its exercise will not bind the infant. It is immaterial upon what advice the application for assessment of compensation was made on behalf of the infant. The Court ought itself, in the case of an infant, to examine the facts and determine whether the verdict of the jury was a proper verdict, in order to see whether it was for the infant's benefit to make such an application, just as, in the case of a contract made by an infant, the Court must consider whether it is for the infant's benefit. [He cited on this point *Stephens v. Dudbridge Ironworks Co.* (3)]

*R. B. D. Acland, K.C.*, for the defendants, in reply. In such a case as this it is not merely the exercise of an option by the plaintiff that creates a bar to further proceedings in the action. By bringing into play the procedure given by sub-s. 4, a statutory liability has been created on the part of the employer, which is inconsistent with, and prevents the plaintiff from setting up, the right originally claimed in the action. The award of compensation by the judge has the effect of a judgment which stands, and cannot be set aside. There is no analogy between this case and that of a contract by an infant, depending merely on the exercise of the will of the infant. There is here a judgment, or order, of a Court still subsisting, that has come into existence in pursuance of a statute, which provides that there cannot be a liability to make the compensation awarded by that judgment or order and also a liability to proceedings independently of the Act. The award of compensation is not the less a judgment of the Court because the plaintiff has assented to it. The decision in *Stephens v. Dudbridge Ironworks Co.* (3) has no application to the present case. The infant in that case

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(2) [1899] 2 Q. B. 333.

(3) [1904] 2 K. B. 225.

C. A. had not become bound by the result of any judicial proceeding  
1906 before bringing the action.

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COLLINS M.R. In this case an application is made by the plaintiff for judgment or a new trial. A preliminary objection is taken to that application, which arises in the following way. The plaintiff, who is an infant suing by his next friend, has brought an action claiming damages by way of compensation for personal injuries occasioned to him, as he alleges, through the negligence of the defendants, or through their non-performance of a duty imposed upon them by the Factory and Workshop Act, 1901. At the trial of that action the plaintiff failed, and the defendants obtained a verdict, which it is now sought to impeach as having been wrong. When the plaintiff failed to obtain a verdict at the trial, his counsel, taking on his behalf a course which was open to him under the Workmen's Compensation Act, 1897, claimed the benefit of a provision in that statute enabling the plaintiff to ask for an alternative remedy; and he obtained what he asked for in the shape of an award of compensation, which now stands unimpeached. By s. 1, sub-s. 2 (b), of the Act it is provided that, "when the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceedings independently of this Act, except in case of such personal negligence or wilful act as aforesaid." By sub-s. 4 it is enacted that "if, within the time hereinafter in this Act limited for taking proceedings, an action is brought to recover damages independently of this Act for injury caused by any accident, and it is determined in such action that the injury is one for which the employer is not liable in such action, but that he would have been liable to pay compensation under the

provisions of this Act, the action shall be dismissed; but the Court in which the action is tried shall, if the plaintiff shall so choose, proceed to assess such compensation, and shall be at liberty to deduct from such compensation all the costs which, in its judgment, have been caused by the plaintiff bringing the action instead of proceeding under this Act. In any proceeding under this sub-section, when the Court assesses the compensation, it shall give a certificate of the compensation it has awarded and the directions it has given as to the deduction for costs, and such certificate shall have the force and effect of an award under this Act." The procedure indicated by sub-s. 4 was, as I have said, followed in this case; and, the plaintiff having failed in the action, those who represented him took advantage of the option conferred by that sub-section, with the result that the judge assessed compensation under the Workmen's Compensation Act, 1897, at 3s. 6d. a week, and gave a certificate accordingly. Notwithstanding the proceedings so taken and the award so obtained, as the result of the choice exercised by those who represented the plaintiff, which award at this moment stands unimpeached, the plaintiff claims to take proceedings by way of appeal against the verdict and judgment in the action. The preliminary objection is thereupon taken that he is estopped from doing that, by reason of his having already obtained independent and inconsistent relief, namely, an award which stands unimpeached, giving him compensation under the Workmen's Compensation Act, 1897. In support of this objection the defendants rely upon the language of the sub-sections which I have read, and upon an authority which is binding upon us. In the case of *Edwards v. Godfrey* (1) it was decided that, where a workman brings an unsuccessful action for damages in respect of personal injury against his employer, and is desirous of having compensation for his injury assessed under the Workmen's Compensation Act, 1897, he must follow the procedure prescribed by s. 1, sub-s. 4, of that Act, and apply then and there to the judge trying the action for an assessment of compensation, and cannot at a subsequent date initiate independent proceedings against his employer by a request for arbitration under the Workmen's

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Compensation Act. That decision has been criticized, it is said, in an Irish case; but whether that criticism is well or ill founded is immaterial for the present purpose, because the decision is binding on us. I do not wish to be understood as indicating any dissent personally from that decision, to which I was not a party, but in any case, as I have said, it is binding upon this Court. The decision in that case does not appear to me to be otherwise than in accord with the *prima facie* meaning of the language of those provisions of the Workmen's Compensation Act, 1897, to which I have referred, and it emphasizes the fact that the procedure provided for in s. 1 of that Act involves an option to be exercised by the workman. It was competent for the Legislature, when giving to workmen an entirely new right to compensation for injury as against their employers, to clog that right with any conditions which they thought fit to impose. Such a condition is imposed by s. 1, sub-s. 2, of the Act, which provides that, when the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default he is responsible, nothing in the Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under the Act or take the same proceedings as were open to him before the commencement of the Act, but the employer shall not be liable to pay compensation for injury to a workman both independently of and also under the Act. That sub-section gives the workman, in cases to which it applies, an option whether he will claim compensation under the Act or take proceedings against the employer independently of the Act; but, having that option, he must take it subject to the condition upon which it is given, namely, that, though he may have one of two modes of relief, he cannot have both. Therefore a concluded election to accept one of these modes of relief operates to debar him from claiming the other. If the section had stepped there, it would seem that possibly an election by the workman to take proceedings independently of the Act might, even if such proceedings proved unsuccessful, have prevented him from afterwards having recourse to the alternative remedy given by the Act. In view, apparently,

of the possibility of that result, the Legislature has thought fit to mitigate any hardship that might thus be occasioned by introducing the qualification contained in sub-s. 4: the effect of which appears to be that, even although proceedings have been initiated by the workman against the employer independently of the Act by action at common law or under the Employers' Liability Act, yet, if those proceedings prove unsuccessful at the trial, the workman shall have a right, if he chooses, to recur to his remedy under the Workmen's Compensation Act on the condition laid down by the sub-section, namely, that he shall then and there make an application for compensation under that Act and obtain an assessment of such compensation by the judge. The result of such an application, and an award of compensation thereupon made by the judge, seems to me to be that the option given to the workman by the Act is conclusively exercised. The plaintiff in this case having obtained such an award, which stands unimpeached, and which we are bound to accept as properly made, no steps having been taken with a view to setting it aside, it appears to me that the plaintiff's option has been finally determined, and the rights of the parties are governed by that award, and that the plaintiff cannot now recur to the remedy originally claimed in respect of which he was unsuccessful in the Court below. It has been suggested that the case of *Isaacson v. New Grand (Clapham Junction), Ltd.* (1), decided by the Divisional Court, militates against the conclusion which I have indicated. I do not think it necessary for the purposes of the present case to pronounce any opinion as to whether that case was correctly decided or not. It was there held that the mere application for an assessment of compensation under the Workmen's Compensation Act, 1897, upon the dismissal of an action under the Employers' Liability Act, did not amount to the exercise of an option so as to estop the plaintiff from appealing against the dismissal of the action. It is not necessary to say whether that decision was right, because it does not apply to the present case. Here the matter did not stop short at a mere application, but ripened into an award of compensation,

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which is unimpeached. Therefore the two cases are quite distinguishable, and it is not necessary for us to consider whether we agree with what was said in that case by the Lord Chief Justice and the other judges, for, assuming that their decision was correct, it does not touch the present case. It appears to me, therefore, that on principle, and on the true construction of the words of the Act, and also upon the authorities, the plaintiff, having obtained a remedy under the Workmen's Compensation Act, 1897, cannot now recur to a remedy by action.

Another point was taken, which appears to me to be really concluded by the reasons which I have given with regard to the main point. It was suggested that the option which was exercised by the next friend, suing on behalf of the infant, must be treated on the same footing as a contract made by or on behalf of an infant; and therefore the Court must inquire whether its exercise was for the benefit of the infant or not, and that, under the circumstances, the Court ought to deal with the award on the footing that the option had not been exercised for the benefit of the infant. That argument appears to me on the face of it defective. It asks us to assume that the award of a judge made on the trial of an action in pursuance of sub-s. 4 of the Workmen's Compensation Act, 1897, to impeach which award no steps have been taken, stands on the same footing as a contract of an infant the validity of which is being impeached. It seems to me that there is no analogy between the two. Moreover, I see no ground for supposing that the option was not exercised for the benefit of the infant. The claim made on his behalf in the action had failed at the trial, and, if the verdict of the jury stood, the plaintiff would have been deprived of all remedy, unless a claim for compensation under the Workmen's Compensation Act, 1897, were made. *Prima facie* it would seem to be for the benefit of the infant that such a claim should be made. It does not, however, appear to me that we have any jurisdiction to inquire into that question, for I think we must treat the award of compensation by the judge as valid, no steps having been taken to impeach it. For these reasons I think that the preliminary objection succeeds, and the application for judgment or a new trial must be dismissed.

FLETCHER MOULTON L.J. I am of the same opinion. The Workmen's Compensation Act, 1897, s. 1, sub-s. 2 (b), provides, with regard to injury to a workman by an accident arising out of and in the course of his employment, that the employer shall not be liable to any proceedings independently of the Act, except in the case of personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible. It was contemplated by the Legislature that proceedings taken by a workman against his employer independently of the Act might fail by reason of the case not coming within the limits specified in that sub-section. In mercy, therefore, to the workman, it provided in sub-s. 4 of s. 1 that, upon the failure of such proceedings, the workman may, if he chooses, request the judge to assess compensation under the Workmen's Compensation Act, 1897, though the proceedings were not originally taken under that Act. I am satisfied that the Act contemplates the exercise of the option so given as being in the nature of a step in the action, and therefore it is a step which may properly be taken by the next friend in the case of an action brought in the name of an infant by his next friend. In the present case that procedure was adopted. Upon the plaintiff's failing to obtain a verdict at the trial, an application for assessment of compensation under the Workmen's Compensation Act, 1897, was made on his behalf, and resulted in an award of compensation by the judge, which award is equivalent to a judgment whereby the defendants became liable to pay the weekly sum awarded by way of compensation to the plaintiff. I am of opinion that in these circumstances there was an election conclusively and irrevocably exercised by the next friend, properly acting on behalf of the infant, by which the plaintiff is estopped from taking further proceedings in the action.

FARWELL L.J. I agree. The opening words of s. 1, sub-s. 2 (b), of the Workmen's Compensation Act, 1897, describe such a cause of action as that sued upon by the plaintiff in the present case, and the sub-section provides that in respect of such a cause of action the workman may, at his option, have one of two alternative

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remedies, namely, compensation under the Act or such remedy as he would have had independently of the Act. According to the ordinary rule on the subject, as well as by the express terms of the sub-section, the workman cannot in such a case have the benefit of both remedies. It is admitted that, if judgment had been obtained by the plaintiff in the action for damages of less amount than he considered adequate, he could not afterwards have had recourse to proceedings under the Workmen's Compensation Act, 1897. A workman who has brought an action against his employer for damages in respect of personal injuries sustained in the course of his employment, and has failed, is placed by sub-s. 4 of s. 1 of the Act in a better position than he otherwise would have occupied. The plaintiff has availed himself of the option given by that sub-section, and has obtained a certificate from the judge at the trial, which is equivalent to an award of compensation under the Act, and therefore, by virtue of r. 26 of the Workmen's Compensation Rules, is enforceable as a judgment or order of the Court. It seems to me that the award so obtained clearly has the effect of an estoppel by judgment.

It was argued that the fact of the plaintiff's being an infant prevented his being estopped by the award. I cannot follow that argument. The question here is not as to the validity of a contract made by an infant, but as to his estoppel by the result of proceedings taken in an action. I cannot see any ground for the suggestion that the plaintiff, because he is an infant, is in any better position than that in which an adult would have been, if an action in which he was plaintiff had resulted in the same way as the action in the present case. The decision of the Divisional Court in *Isaacson v. New Grand (Clapham Junction)*, *Ld.* (1), whether correct or not, does not affect the present case. The decision that there might in the circumstances of that case be a locus pœnitentiæ before any award of compensation was made cannot apply to the case of anyone, whether adult or infant, who has proceeded to obtain a judgment which operates by way of estoppel against any further proceedings upon the claim originally made in the action. I observe that the

decision in the Irish case, *Beckley v. Scott* (1), which is said to conflict with the decision of this Court in *Edwards v. Godfrey* (2), was not unanimous, either in the Court below or in the Court of Appeal, but in any case we are bound by the judgment in *Edwards v. Godfrey* (2), which, so far as I can see, was rightly decided.

*Application dismissed.*

Solicitors for plaintiff: *Pattinson & Brewer.*

Solicitors for defendants: *Helder, Roberts & Co., for Tunbridge & Co., Birmingham.*

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[IN THE COURT OF APPEAL.]

IN THE MATTER OF AN ARBITRATION BETWEEN CROASDELL  
AND CAMMELL, LAIRD & CO., LIMITED.

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*Practice—Order, whether Final or Interlocutory—Arbitration—Setting aside Award—Arbitration Act, 1889 (52 & 53 Vict. c. 49), ss. 5, 10, 11—Order LVIII. r. 3.*

Where, in an arbitration held under a submission to arbitration contained in an agreement, the arbitrator made his award in the form of a special case, but a Divisional Court subsequently made an order setting the award aside on the ground of misconduct on the part of the arbitrator:—

*Held*, that the order so made was an interlocutory and not a final order.

APPLICATION for the transfer of an appeal from the final list to the interlocutory list.

An agreement made between Croasdel, the appellant, and Cammell, Laird & Co., Limited, the respondents, contained a clause providing for the reference to arbitration of any disputes which might arise between the parties under the agreement. Such disputes having arisen, the parties agreed in nominating an arbitrator in respect thereof. The arbitrator so nominated being unable to act, the respondents failed to join in the appointment of another arbitrator, and thereupon the appellant applied for

(1) [1902] 2 I. R. 504.

(2) [1899] 2 Q. B. 333.

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the appointment of an arbitrator under s. 5 of the Arbitration Act, 1889, to a Master at chambers, who accordingly appointed an arbitrator. This arbitrator proceeded with the reference, and ultimately made his award in the form of a special case for the opinion of the Court. The respondents subsequently applied to a Divisional Court to set aside the award on the ground of conduct on the part of the arbitrator which technically amounted to misconduct, and the Divisional Court on that application made an order setting aside the award. The appellant thereupon gave notice of appeal against the order, and the appeal had been entered in the final list. (1)

*C. A. Russell, K.C. (Shepherd Little with him)*, for the appellant. The order appealed against was an interlocutory order, and therefore the appeal should be entered in the interlocutory list. There is a conflict of authority on the question what constitutes a final order. In *Salaman v. Warner* (2) the Court of Appeal, as then constituted, held that the test is whether the order was one made in a proceeding the result of which must, whichever way it is determined, finally decide the matter in dispute. The Court of Appeal in *Bozson v. Altrincham Urban Council* (3) did not approve of the test so laid down, and held that, if the order actually made had the effect of finally determining the rights of the parties, it was a final order. In the case of *In re Stockton Iron Furnace Co.* (4) Jessel M.R. laid down the rule as being that final orders were those which determined the rights of parties, and those orders which did not determine the rights were not final. According to the test laid down in *Bozson v. Altrincham Urban Council* (3) the order setting aside the award is not a final order; but, whether that test or the test adopted in *Salaman v. Warner* (2) be applied, the result in this case is the same. The order leaves the rights of the parties as regards the matters in dispute in the

(1) There being a conflict of authority on the question what constitutes a final as opposed to an interlocutory order, the case was directed to be argued before the full Court of Appeal, but it will be

observed that in the result no general rule on the subject was laid down.

(2) [1891] 1 Q. B. 734.

(3) [1903] 1 K. B. 547.

(4) (1879) 10 Ch. D. 335, at p. 349.

arbitration entirely undetermined. The parties had, for the purpose of determining those rights, engaged in an arbitration, which must be treated for the present purpose on the same footing as if it were an action or other litigation commenced to determine rights in dispute; and the result of the order of the Divisional Court was that those rights were left undecided. Arbitration has been recognized by the Courts, and by the Legislature in the Arbitration Act, 1889, as a mode of litigation by which legal rights in dispute may be determined; and when disputes have arisen, and been formulated before such a tribunal, the question whether an order in relation thereto is final depends upon whether those disputes have been determined by it. In the case of *In re Delagoa Bay Ry. Co. and Tancred* (1) the Court held that an appeal from a refusal to set aside or refer back an award was analogous to an application for a new trial, and must be treated as an interlocutory matter. The proper test is to consider what are in substance the matters in dispute in the proceedings between the parties, and whether the order has finally determined them. The effect of the order here is merely that the decision of a particular arbitrator has been set aside, and he himself possibly incapacitated as an arbitrator in the matter, but the questions at issue have not been decided. [He also cited *Shubbrook v. Tufnell* (2); *Collins v. Paddington Vestry* (3); *Standard Discount Co. v. De La Grange* (4); *In re Herbert Reeves & Co.* (5); *Trowell v. Shenton.* (6)]

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*A. J. Ashton*, for the respondents. It is fallacious to treat the arbitration as analogous to an action still pending between the parties to it, which remains undetermined. The particular arbitration is by the order of the Divisional Court determined. There is a well-established distinction between a general agreement to refer disputes and the submission of a particular dispute, which has been formulated, to a particular arbitrator. Such a dispute was no doubt formulated in the present case and submitted to an arbitrator; but the arbitrator, having made his

(1) (1889) 37 W. R. 578.

(4) (1877) 3 C. P. D. 67.

(2) (1882) 9 Q. B. D. 621.

(5) [1902] 1 Ch. 29.

(3) (1880) 5 Q. B. D. 368.

(6) (1878) 8 Ch. D. 318.



C. A. award, is functus officio, and the effect of the order is that that  
1906. arbitration has been rendered abortive and has disappeared,  
leaving only the general agreement to refer. There may possibly  
be a fresh arbitration concerning the same disputes, or the  
appellant may bring an action in respect of them. The only  
litigation in the proper sense of the word that ever took place  
was the proceeding in the High Court to have the award set aside.  
The matter in dispute between the parties in that litigation was  
the question whether that award should stand or not, and that  
matter has been finally determined by the order of the Divisional  
Court. Their order, therefore, is a final order.

*C. A. Russell, K.C., in reply.*

COLLINS M.R. For reasons which I will give, I do not think that it is necessary for the purposes of this case to go through the decisions to which reference has been made during the argument. The order appealed against is one made upon an application to set aside an award which an arbitrator had made in the form of a special case, upon the ground of some technical misconduct, or excess of jurisdiction, on the part of the arbitrator. The result of the application was that the award was upon that ground set aside by the Divisional Court. The decision upon that application involved no determination of the rights of the parties as regards the matters which were in dispute in the arbitration. It simply decided that the award given was abortive, and did not pretend to determine the various questions raised for decision by the special case, thus leaving the matter where it stood before the arbitrator had made his award. The question now is whether the order so made by the Divisional Court was final or interlocutory. It appears to me that, whatever test is applied, it is certainly interlocutory. In my opinion the parties to this arbitration are for the present purpose in substantially the same position as the parties to a litigation. The law having asserted its jurisdiction over these consensual arrangements for the decision of disputes between parties, and the machinery of the law having been introduced which gives effect to them beyond that given by the mere agreement of the parties, the proceedings must be treated on the same footing for

the present purpose as proceedings in a litigation. Where there is, as in this case, an agreement for the reference to arbitration of disputes which may arise, and, disputes having arisen, proceedings for the determination of them by arbitration have been commenced, and the machinery of the law has thereby been introduced, so that the disputes have been crystallized and brought for determination before an arbitrator, who is then acting in the exercise of a jurisdiction subject to the sanction and control of the Court, it seems to me that an order of the Court such as that in the present case, which does not determine any of those disputes, but leaves them where they were, and merely asserts an informality in the award which has been given, is only interlocutory. It decides none of the rights in dispute; and the Court retains its jurisdiction over the arbitration, and could send the matter back to the same or another arbitrator. These considerations seem to me to be sufficient to decide the present case, and therefore the appeal must be transferred to the interlocutory list. As regards the enunciation of any general rule on the question what orders are final and what are interlocutory, that is a matter which it might be our duty to undertake, but for the fact that it is one which falls within the jurisdiction of the Rule Committee, and under the circumstances it appears to me that it would be more desirable that it should be dealt with by that committee than in a case for the purposes of which it is not necessary to lay down such a rule; and I therefore refrain from going further into the cases or endeavouring to formulate a fresh rule on the subject.

VAUGHAN WILLIAMS L.J., ROMER L.J., COZENS-HARDY L.J., FLETCHER MOULTON L.J., and FARWELL L.J. concurred.

*Application allowed.*

Solicitor for appellant: *H. Nelson Paisley, for Paisley, Falcon & Skerry, Workington.*

Solicitors for respondents: *Ledyard & Smith, for T. Milburn Workington.*

E. L.

C. A.

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CROASDELL  
AND  
CAMMELL,  
LAIRD,  
& CO.,  
LIMITED,  
*In re.*

Collins M.R.]

C. A.

[IN THE COURT OF APPEAL.]

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July 12, 13.

WEINER v. GILL.

SAME v. SMITH.

*Sale of Goods—Sale or Return—Sale for Cash only—Passing of Property—Pledge—“Act adopting the Transaction”—Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 18, r. 4.*

The plaintiff, a manufacturing jeweller, delivered jewellery to H., a retail jeweller, on the terms of a memorandum headed “On approbation. On sale for cash only or return. Goods had on approbation or on sale or return remain the property of W. (the plaintiff) until such goods are settled for or charged.” H., being informed by L. that he had a customer who might buy the goods, delivered them to L. upon the terms of his paying cash or returning them in a few days. L. had no customer, and fraudulently pledged the goods with the defendant, a pawnbroker. In an action to recover the goods from the defendant:—

*Held*, that the goods were not delivered to H. “on approval, or on sale or return or other similar terms” within the meaning of s. 18, r. 4, of the Sale of Goods Act, 1893; that the terms of the memorandum shewed that the intention of the plaintiff and H. was that the property in the goods should not pass to H. until he paid for them or was debited with the price by the plaintiff; that consequently the property in the goods had not passed out of the plaintiff, and that he was entitled to recover from the defendant.

Judgment of Bray J., reported [1905] 2 K. B. 172, affirmed.

APPEAL from the judgment of Bray J. at the trial without a jury. (1)

The plaintiff was a manufacturing jeweller, carrying on business in Hatton Garden. The defendants in the first action were the executors of one Gill, a pawnbroker, carrying on business at Hampstead Road, in the county of London; and the defendants in the second action were the executors of a pawnbroker named Robinson, carrying on business at Mortimer Street, in the said county.

The actions were for the delivery up of a diamond brooch, a diamond circular pendant, and a pair of diamond earrings belonging to the plaintiff, and wrongfully pawned with the defendant Smith by one Longman, and of a diamond necklace

belonging to the plaintiff, and wrongfully pawned with the defendant Gill by the said Longman. The plaintiff had in the months of August and September, 1904, delivered these articles to one Huhn, a dealer in jewellery, upon the terms in each case of a note or memorandum bearing the following heading: "On approbation. On sale for cash only or return. From Samuel Weiner, diamond mounter and manufacturing jeweller. Goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or charged. The consignees are responsible for these goods until they are returned to my possession." The note specified the price at which the plaintiff was willing to sell the articles. Huhn delivered the articles to Longman, who was also a dealer in jewellery, upon the representation by Longman in the case of each article that he had a particular customer who was desirous of buying an article of that description, and he so delivered them to Longman upon the terms that Longman should pay immediate cash for them or return them in a few days. In fact, Longman had no customer for any of the articles, and he immediately on receiving them from Huhn pledged them with the defendants respectively, who advanced money on them in good faith. Longman was subsequently prosecuted by Huhn for larceny of the articles, but was acquitted.

Bray J. gave judgment for the plaintiff in both actions. The defendants appealed.

*J. A. Hamilton, K.C.*, and *C. Attenborough*, for the defendants. Having regard to the findings of fact by Bray J., it is not now contended that the plaintiff is estopped from denying the defendants' title to the goods; but the learned judge was wrong in holding that the property in the goods had never passed out of the plaintiff. The goods were delivered to Huhn on the terms of "sale or return" within the meaning of s. 18, r. 4, of the Sale of Goods Act, 1893 (1), and when Huhn handed over the

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(1) The Sale of Goods Act, 1893, s. 18: "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the

property in the goods is to pass to the buyer:—Rule 4: When goods are delivered to the buyer on approval or 'on sale or return' or other similar terms the property therein



C. A. goods to Longman he did an act "adopting the transaction"  
 1906 within the meaning of that rule, and the property in the goods  
 WEINER thereupon passed from the plaintiff to Huhn: *Kirkham v.*  
 v. *Attenborough* (1); *Ray v. Barker* (2); *Moss v. Sweet* (3); *Beverley*  
 GILL. *v. Lincoln Gas Light and Coke Co.* (4) On this point *Kirkham v.*  
 SAME *v. Attenborough* (1) is conclusive in the defendants' favour, unless  
 v. SMITH. that case is distinguishable by reason of the terms of the contract  
 between the plaintiff and Huhn. The meaning and effect of a  
 contract in similar terms was discussed in the Scotch case of  
*Bryce v. Ehrmann* (5), where it was held that the term that  
 the goods were to remain the property of the vendor "until  
 invoiced" was only intended to keep up the vendor's right to  
 them while they were in the purchaser's hands or if they fell  
 into the hands of his creditors, and that it did not invalidate a  
 pledge by the buyer. If that is not the right construction of a  
 contract in these terms, and if the dealer cannot pass the property  
 in the goods without first paying the owner, business of this kind  
 becomes impossible, for the goods are delivered to the dealer for  
 the very purpose of finding a purchaser, and secret arrangements  
 of this kind are mere traps for unwary purchasers. Bray J.  
 distinguished *Bryce v. Ehrmann* (5) on the ground that in that  
 case the contract did not, as here, contain the words "for cash  
 only." The omission of those words does not affect the question,  
 for every sale is deemed to be for cash unless credit is expressly  
 agreed to be given. Adopting the construction placed upon the  
 contract in *Bryce v. Ehrmann* (5), this case comes within the  
 principle of *Kirkham v. Attenborough*. (1) The defendants are  
 also protected by s. 25, sub-s. 2, of the Sale of Goods Act, 1893. (6)

passes to the buyer—(a) where he signifies his approval or acceptance to the seller, or does any other act adopting the transaction."

(1) [1897] 1 Q. B. 201.

(2) (1879) 4 Ex. D. 279.

(3) (1851) 16 Q. B. 493.

(4) (1837) 6 A. & E. 829.

(5) (1904) 7 F. 5; 42 Sc. L. R. 23.

(6) Sect. 25, sub-s. 2: "Where a person having bought or agreed to buy goods obtains, with the

consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any other person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have

Longman was a person who had agreed to buy goods within the meaning of that section, and he obtained possession of them with the consent of the seller, that is, Huhn, for seller means a person who has a right to sell. The subsequent pledge by Longman with the defendants was, therefore, good as against the plaintiff.

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*Rawlinson, K.C.*, and *H. Dobb*, for the plaintiff. The goods in question were the plaintiff's goods, and the defendants can only justify their possession of them by shewing either that the plaintiff had sold the goods to someone, or that the plaintiff is estopped from denying their title. The latter ground is now abandoned. In support of the former, the defendants rely on r. 4 of s. 18 of the Sale of Goods Act, 1893. The application of that section is limited by the opening words: "Unless a different intention appears." Here a different intention does appear, for the contract between the plaintiff and Huhn provides that the goods are to remain the property of the plaintiff until they are paid for. The argument for the defendants implies that Huhn could give himself a title by doing something inconsistent with and in breach of the terms of his contract. This is not an ordinary contract of sale or return. The parties have expressly agreed that the property was not to pass until Huhn paid for the goods or was debited with the price. There was no other act that Huhn could do to adopt the transaction, and it is not necessary to have recourse to the test provided by r. 4 of s. 18 to ascertain the intention of the parties as to when the property was to pass. *Kirkham v. Attenborough* (1) has no application when the provisions of the section are ousted by the express terms of the contract. In any case Huhn did not do any act adopting the transaction. The act must be one which can support an inference of an intention to buy, but Huhn was induced to part with the goods by the fraud of Longman, and it is impossible, therefore, to infer an intention on Huhn's part to transfer the property in the goods from the plaintiff to himself.

*Hamilton, K.C.*, replied.

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the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner."  
(1) [1897] 1 Q. B. 201.

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LORD ALVERSTONE C.J. In this case I am of opinion that the judgment of Bray J. was right and must be affirmed. The question arises under a document in an unusual form by which a contract was created between the plaintiff and Huhn, to whom certain goods were entrusted by the plaintiff.

Before dealing with the main point which has been argued in this Court, I wish to say that I express no opinion as to the question of estoppel which was raised in the Court below but has not been argued before us. With regard to the argument based on s. 25 of the Sale of Goods Act, 1893, and the parting with the jewellery by Longman, in my opinion the short answer to it is that, as Longman obtained possession of the goods by fraud, the defendants cannot rely on Longman's acts as giving them a title against the plaintiff.

The main question which has been argued before us, and which Bray J. decided in favour of the plaintiff, is whether the property in the goods had passed from the plaintiff to Huhn so as to enable the defendants to say that they had acquired a good title to them. If this contract were an ordinary contract by which goods are delivered to a buyer on sale or return the case of *Kirkham v. Attenborough* (1) would be a conclusive authority in favour of the defendants, for the principle was there laid down that, in the case of a contract on sale or return, the buyer is entitled to retain the goods for a time on credit, but if he deals with the goods in a way which in ordinary circumstances and apart from any special terms in the contract is inconsistent with his right to return them, as, for example, by selling or pledging them, he loses the right to return them and the property in the goods passes to him. Bray J. has decided that, having regard to the terms of this contract, the case does not come within that principle. I may say in passing that I do not think that the case of *Bryce v. Ehrmann* (2) is of very much assistance to us in deciding the present case. The judges who decided that case did express certain opinions with regard to the meaning and effect of a contract the language of which was to a certain extent similar to, though not identical with, this contract, but the facts of the two cases are not the same.

(1) [1897] 1 Q. B. 201.

(2) 7 F. 5; 42 Sc. L. R. 23.

It is contended for the defendants that Huhn was entrusted by the plaintiff with the possession of the goods for the purpose of finding a purchaser; that for that purpose, but for no other, he was allowed to part with the possession of them; and that when he handed the goods over to Longman he did an act which was equivalent to the kind of act which was held in *Kirkham v. Attenborough* (1) to be an act adopting the transaction—in other words, that he dealt with the goods under the contract in such a way that the property in them passed to him.

The question which we have to determine, therefore, is whether this contract is an ordinary sale or return contract. Sect. 18 of the Sale of Goods Act, 1893, provides that: “ Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—Rule 4: When goods are delivered to the buyer on approval or ‘on sale or return,’ or other similar terms, the property therein passes to the buyer—(a) when he signifies his approval or acceptance to the seller, or does any other act adopting the transaction.” It is contended for the plaintiff that it appears from the terms of this contract that the parties had a different intention as to the time at which the property in the goods should pass, and that r. 4 has therefore no application to the case. The document which constitutes the contract under which the goods were delivered by the plaintiff to Huhn is in the following terms: “ On approbation. On sale for cash only or return.” If it had stopped there there might have been a difficulty in the plaintiff’s way, for I can imagine a case of goods being delivered on sale or return on the terms that the buyer should pay cash as soon as he has signified his acceptance or approval or done any other act adopting the transaction. I do not think the giving of credit is an essential element in a contract of sale or return. But, however that may be, this document goes on to say that “ goods had on approbation or on sale or return remain the property of Samuel Weiner until such goods are settled for or charged.” That is, in my opinion, a distinct statement of the intention of the parties that property in the goods was not to pass to Huhn unless and until

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he informed the plaintiff that he accepted the goods and at the same time tendered the money for them, or asked the plaintiff to debit him with the price and the plaintiff consented to do so. It follows that in the words of s. 18 "a different intention appears," and therefore the intention of the parties as to the time at which the property is to pass is not to be ascertained according to r. 4 of that section, the parties themselves having clearly indicated by the terms of the contract that the property was only to pass when Huhn paid cash or was debited by the plaintiff with the price of the goods. That being so, it is obvious that the case of *Kirkham v. Attenborough* (1) has no application to the facts of this case.

In my opinion Bray J. has taken the true view of this contract, and was right in holding that in the circumstances the property in the goods had not passed to Huhn. The appeal must therefore be dismissed.

SIR GORELL BARNES, PRESIDENT. I agree that this appeal must be dismissed. We are not concerned with the question of estoppel, because counsel for the defendants has declined to base his case upon that point, possibly for the reasons appearing in the latter part of the judgment delivered by Bray J. in the Court below. Nor is it necessary, in my opinion, to consider the Scotch case of *Bryce v. Ehrmann* (2), for that case was decided on a different form of contract and under rules of law which differ from those applicable in this country. The only question which we have to consider is whether the property in these goods had passed from the plaintiff to Huhn. As a general rule a person in the possession of goods cannot convey a better title to them than he himself has. There are exceptions to that rule, examples of which are to be found in the Factors Act, 1889, and in s. 25 of the Sale of Goods Act, 1893. It has been argued that in the present case the defendants are protected by s. 25 of the latter Act, but, having regard to the facts of the case, I do not think that that argument can be successfully maintained. In considering the question whether the property passed from the plaintiff to Huhn regard must be had to the terms of s. 17 and

(1) [1897] 1 Q. B. 201.

(2) 7 F. 5; 42 Sc. L. R. 23.

s. 18 of the Sale of Goods Act. Sect. 17 provides that: "(1.) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties intended it to be transferred. (2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case." [The President also read s. 18, r. 4.] If the present case were one falling within the terms "on sale or return" in r. 4, then the case of *Kirkham v. Attenborough* (1) would no doubt be in point, because, as was said by Wightman J. in *Moss v. Sweet* (2), the meaning of a contract of sale or return is "that the goods were to be taken as sold, unless returned within a reasonable time." In the present case, however, we are dealing with a contract of an entirely different character, for on the face of the contract there appears a different intention as to when the property shall pass from that laid down in r. 4 of s. 18. The terms of the contract shew a clear intention that no property in the goods shall vest in Huhn until he has paid for them or been charged by the plaintiff for them. So that no means existed by which the buyer could exercise such an option as was indicated in r. 4. The only thing he could do was to pay cash for them or to get the plaintiff to debit him with the price. That was not done, and therefore, in my opinion, the property in the goods never passed to Huhn, and consequently the defendants have no answer to the plaintiff's claim.

FARWELL L.J. I agree. I treat the case simply as a common law case of the right of property passing as between the parties to this arrangement. I desire to reserve my judgment as to what the position would have been if the rights of third parties, purchasers for value without notice, claiming under the doctrine of estoppel had had to be considered.

With regard to the question as to the passing of the property, I do not see how the provisions of r. 4 of s. 18 of the Sale of Goods Act, 1893, can have any application to a case like the present, where the goods were delivered, not merely on approval or on "sale or return," but on approval or sale for

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(1) [1897] 1 Q. B. 201.

(2) 16 Q. B. 493, at p. 495.

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cash. The payment of cash was apparently intended to accompany, or to follow, the delivery before any property passed. I see no reason why two parties, as between themselves and also as between themselves and a third party who cannot set up the doctrine of estoppel, should not agree to an arrangement of that kind.

I must say that if it were not for the doctrine of estoppel, I should have had very great difficulty in seeing the answer to the point made by Mr. Hamilton in the course of his very able argument that arrangements of this kind might be used by dishonest persons as a trap by which the original owner of the jewellery might defraud unwary purchasers. My own view is that when a case of that sort has to be considered, it will be found that the doctrine of estoppel gets rid of the difficulty. If I did not think so, I should be much inclined to consider whether this contract could not, in some way or other, be construed, as the contract in *Bryce v. Ehrmann* (1) appears to have been construed by the Scotch Court, so as to prevent that difficulty from arising. I do not desire to do more than to refer to the judgment which I gave in *Rimmer v. Webster* (2); at p. 172 of the report there will be found the considerations which I thought applied to an estoppel of this kind; and I would point out that in the case in the House of Lords, *Farquharson v. King* (3), to which Bray J. referred, the real question, according to Lord Lindley, for the jury was: "Did the plaintiffs so act as to hold Capon out to the defendants as their agent to sell goods to the defendants?" The same test might very well be applied to a case where a man, although not in terms an agent, is clothed with the indicia of title to goods for the purpose of selling them, so that if it cannot be said that the property in the goods has passed to him, it may nevertheless be said that he was the agent of the owner of the goods, and in that way the injustice could be avoided. I agree that this appeal must be dismissed.

*Appeal dismissed.*

Solicitor for plaintiff: *J. A. White.*

Solicitors for defendants: *Attenborough & Son.*

(1) 7 F. 5; 42 Sc. L. R. 23.

(2) [1902] 2 Ch. 163.

(3) [1902] A. C. 325, at p. 343.

## BURKE v. AMALGAMATED SOCIETY OF DYERS.

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May 15.

*Trade Union—Member—Benefits during Sickness—Insanity of Member—  
Alteration during Member's Insanity of Rule as to Benefits—Alteration  
binding on Member—Jurisdiction of Courts—Trade Union Act, 1871  
(34 & 35 Vict. c. 31), s. 4, sub-s. 3.*

The alteration by a trade union, during the insanity of a member, of a rule as to sick benefits, to the prejudice of that member, is binding upon him if made in accordance with the rule authorizing and regulating the alteration of the rules of the union.

*Semble*, an action is not maintainable by a member or his representatives against a registered trade union to recover sick pay under the rules relating to sick benefits for members.

*Swaine v. Wilson*, (1889) 24 Q. B. D. 252, considered.

APPEAL from a decision of the judge of the Bradford County Court.

The plaintiff, who was the widow and administratrix of Joseph Burke, a member of the defendant society, sued the defendants, who were a trade union registered under the Trade Union Act, 1871, to recover a sum of 63*l.* 10*s.* for sick benefits alleged to be due to her husband at the date of his death. The deceased became a member of the defendant society in June, 1892. By rule 39 of the rules of the defendants which were then in force he was entitled, in the event of sickness, to sick pay or sick benefits at the rate of 8*s.* per week for twenty-six weeks, 4*s.* per week for the next twenty-six weeks, and 2*s.* per week afterwards as long as he remained on sick benefit. In January, 1893, Burke became insane, his insanity being admittedly a sickness within the meaning of rule 39; he was removed to the county lunatic asylum, where he remained till his death in February, 1905. The sick pay of 8*s.* per week for the first twenty-six weeks and of 4*s.* per week for the next twenty-six weeks was duly paid by the defendants to the plaintiff, as Burke's wife. In 1893 certain alterations were proposed in the rules of the defendants, and by a resolution duly passed on December 29, 1893, rule 39 was amended by the addition of a proviso that any member confined in a lunatic asylum should not be entitled to any benefits paid by the society. The defendants paid no more sick pay to Burke or to the plaintiff



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on his behalf after they had paid the benefits for fifty-two weeks as mentioned above, but the plaintiff kept up her husband's contributions as a member of the society. At the trial the county court judge held that the deceased man was, notwithstanding his insanity, bound by the alteration in the rule, which had been made in accordance with the power to alter the rules contained in rule 79; and he gave judgment for the plaintiff for 18s., being sick pay at the rate of 2s. a week for nine weeks, the period which elapsed between the last payment for which the defendants had paid and the date of the registration of the resolution which altered the provisions of rule 39. The plaintiff, who contended that the deceased was not bound by any alteration in the rules to which, owing to his insanity, he was unable to give consent, appealed. (1)

(1) By rule 1 of the defendant society the objects of the society were declared to be "to raise funds, by entrance fees, periodical contributions of members, levies made by the central council, and by interest on capital, for the advancement, regulation and protection of the trade, for the relief of members out of employment from some unjust cause or dispute existing between the employers and the members of this society, and to regulate the relations between them; for the mutual support of its members in case of sickness or accident, for insuring a sum of money to be paid on the death of a member and a sum of money for defraying the expenses of the burial of a member's wife, as hereinafter provided."

By rule 3 the society was to be governed by a central council, composed of representatives of each branch, the number of representatives being in a certain proportion to the number of members in the branch.

By rule 4 each branch was to annually elect representatives to the

central council, any member of twelve months' standing being eligible to represent his branch.

By rule 39: "Any member who has been initiated twelve months and has paid 52 weeks' contributions, not being disentitled to benefits according to rule 48, when visited by sickness or lameness (not occasioned by drunkenness, disorderly conduct, or any disease improperly contracted) shall produce a certificate from a qualified member of the College of Surgeons, to be paid for by the society. Sick pay to commence from the date the said notice was received; the secretary shall then order the sick steward to visit the sick member, who shall be entitled to the sum of 8s. per week for 26 weeks, 4s. per week for the next 26 weeks, and at the expiration of that time to be reduced to 2s. per week, and kept clear on the books so long as he continues on the sick benefit. The member on his recovery must send notice in writing to the secretary within 24 hours, or be fined one shilling."

By rule 79: "All the rules herein

*Compston* for the plaintiff. The alteration of the rule was not binding upon the deceased. He was entitled to sick pay under the rule in force when he joined the society, and never consented to the alteration of that rule. He could not be bound by an alteration of the rule to his prejudice made against his will, or at any rate without his having an opportunity to object, for such an alteration has been held not to be binding on one of two contracting parties: *Auld v. Glasgow Working Men's Building Society*. (1) *Smith v. Galloway* (2) shews that, although a member may be bound by an alteration of a rule made in pursuance of a power of alteration contained in the rule itself, he is only so bound because he must be taken to have assented as a member to the alteration; and such a presumption of assent may be rebutted where, as in the present case, assent is impossible owing to the member being a lunatic and incapable of assenting. A lunatic is as much entitled as any other member to make his voice heard as to the alteration of a rule, and, as in his case there can be no assenting mind, the rule cannot be altered to his prejudice. It is, however, only as against him that the rule remains unaltered; the alteration would be good as against members in a position to assent. It is true that under rule 79 alterations in rules are made by the central council, but the members elect the representatives who form that body, and this right of election the deceased had no power or opportunity of exercising. If it is contended that the two-thirds majority required for the alteration of a rule are the agents of all the members for that purpose, the answer is that agency is revoked by the lunacy of the principal, if it is communicated to the other contracting party: *Drew v. Nunn*. (3)

[KENNEDY J. In that case the principal could at any moment have revoked the authority; here, assuming that there is any question of agency, the member could not possibly have revoked

contained shall be the rules under which this society shall be governed, and no new rules shall be made, nor any of the rules herein contained, or hereafter to be made, shall be amended, altered or rescinded, unless with the consent of a two-thirds

majority of the members present at a central council meeting called for that purpose."

(1) (1887) 12 App. Cas. 197.

(2) [1898] 1 Q. B. 71.

(3) (1879) 4 Q. B. D. 661.

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the authority of the majority to which he had assented when he joined the society.]

*S. T. Evans, K.C. (J. J. Wright with him), for the defendants.* The deceased was bound by the alteration of the rule, and the county court judge was right in so holding. The case of *Auld v. Glasgow Working Men's Building Society* (1) is very different to the present case, for there the rules did not permit of any alteration except with the subsequent assent of the member. In the present case there was an antecedent agreement to be bound by the rules for the time being, and the real question is, What are the rules for the time being? Put in another way the question is, What was the contract into which the deceased entered when he became a member? He clearly agreed, as a term of the contract, that the rules might be altered in accordance with a rule then in existence, and it cannot be successfully contended that when he became insane he ceased to be bound by a rule to which he assented when he entered into the contract. The question of agency does not arise. The rules are conclusive, and even if he had remained sane and had dissented from the alteration the deceased could have done nothing to prevent it: *Rosenberg v. Northumberland Building Society*. (2) Secondly, the county court judge had no jurisdiction to entertain the action. It is true that this objection was not taken below, but it can be taken on appeal, for this Court equally is without jurisdiction: *London, Edinburgh and Glasgow Assurance Co. v. Partington*. (3) Under s. 4, sub-s. 3, of the Trade Union Act, 1871, nothing in the Act is to enable any Court "to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely . . . (3.) any agreement for the application of the funds of a trade union (a) to provide benefits to members." It is impossible to contend that this is not an action to enforce an agreement for the application of the funds of the defendants, who are a trade union, to provide benefits for members. It is clear on reading the rules of the defendants that many of them are in restraint of trade, and it is immaterial that other rules,

(1) 12 App. Cas. 197.

(2) (1889) 22 Q. B. D. 373.

(3) (1903) 19 Times L. R. 389.

which are not themselves in restraint of trade, confer benefits on the members of the society: *Old v. Robson*. (1) Such a society comes within the very words of s. 4 of the Act of 1871, and the Courts have no jurisdiction under that section to enforce an agreement of the nature specified: *Winder v. Kingston-upon-Hull Guardians*. (2) The case of *Swaine v. Wilson* (3), which may be relied on by the plaintiff as in favour of the jurisdiction, is not in point, for in that case the society in question was not a registered society and was not a trade union at all, while the defendant society in the present case is registered under the Trade Union Act, 1871, and under that Act only. The action therefore will not lie.

*Compston*, in reply. The contract entered into by the deceased was not an agreement that the rules might be altered as certain persons might choose to alter them; it was an agreement that the central council might alter the rules, but that the deceased, as a member of a branch, might join in the selection of a delegate to act upon the council. The deceased never divested himself of all voice in the alteration of the rule. The county court had jurisdiction to entertain the claim. On this point *Swaine v. Wilson* (3) is a clear authority for the proposition that where, as in the present case, the main object of the society is the provision of benefits for its members, the Courts have power to enforce the claim of a member. In that case the society was held to be a trade union, but it was nevertheless held that it was a legal society, and that those of its rules which were not in restraint of trade were enforceable, being severable from those which were in restraint of trade.

KENNEDY J. I am of opinion that the decision of the learned county court judge was right, and that this appeal should be dismissed. Two contentions have been raised in argument. The main contention of the plaintiff, the appellant, is that the judge was wrong in awarding her only 18s., and that the amount should have been larger, her right depending, as she contends, on the construction of the rules and upon the consideration

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(1) (1890) 59 L. J. (M.C.) 41. (2) (1888) 20 Q. B. D. 412.  
(3) 24 Q. B. D. 252.



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of the position of her deceased husband as a lunatic though still a member of the society; and she says that the judge was wrong in treating the deceased as bound by a change in the rules which took place after he became a lunatic. Then there is a contention of the defendants, which was not taken in the court below, that neither this Court nor the county court has jurisdiction to entertain the claim of the plaintiff, inasmuch as it is a claim which is expressly barred by the provisions of the Trade Union Acts, 1871 and 1876.

The appellant's case is thus presented to us. Her deceased husband joined the defendant society in June, 1892, and under rule 39 of the defendants, as it then stood, he was entitled to certain benefits, and ultimately to sick pay at the rate of 2s. a week for several years up to the date of his death; she now claims payment, as administratrix, of this money in accordance with that rule, but the county court judge has only given her 2s. a week for nine weeks up to the time when a resolution which varied the provisions of rule 39 was duly registered; his view was that the alteration put an end to the rights of the deceased under the unaltered rule. It is necessary here to refer to rule 79, which was in existence at the date of the deceased becoming a member and is still in force, and which provided that rules could only be amended, altered, or rescinded with the consent of a two-thirds majority of the members present at a meeting of the central council. After the deceased had become entitled to the benefits under rule 39, he having in fact become a lunatic, an alteration of that rule was duly carried by the necessary two-thirds majority, the effect of that alteration being that a member who, as a lunatic, was under the unaltered rule receiving sick benefit at the rate of 2s. a week as long as he remained a lunatic, ceased from the date of the registration of that resolution to have that benefit, which is the benefit sued for in the present action. The plaintiff contends that, whatever may be the effect of the alteration of the rule in the case of other members, it was inoperative as regards the deceased, because he was at the time of the alteration a lunatic, and so remained until his death, and was unable to take any part in the convention of a meeting of the central council or in the appointment of

delegates, and that, under those circumstances, nothing in the rule could be altered to his disadvantage. The question is not wholly free from difficulty, but, upon the whole, I am of opinion that the decision of the county court judge was right, and that the correct legal view is that a person who became a member of this society subject to the rules acquiesced in the alteration of the rules, both as regards himself and the other members, provided, of course, that the formalities prescribed by rule 79 were duly observed.

We have been referred to cases in which it has been held that, where a party to a contract becomes a lunatic and notice of that fact is given to the other contracting party, the authority of his agent is revoked and the estate of the lunatic is not bound by the agent's acts; but in my opinion the question of agency does not arise in the present case. The action is brought in respect of certain obligations by which the deceased was bound as well as the society, which means that, so long as he had the safeguard of the consent of a two-thirds majority to any alteration in the rules, the deceased agreed that alterations might be made. It is suggested that where the relation of principal and agent exists there is a presumption that the agency would be effectually terminated by the dissent of the principal. If the deceased had in fact dissented from the alteration of the rule, he would have been in no better position, but would have been bound by the action of the requisite majority. I think that the proper conclusion in the present case is, that the rule was such that, when it is once shewn that its alteration has been properly carried out with the necessary formalities, every member of the society is bound by the alteration.

I prefer to base my judgment upon the ground which I have been discussing, but I desire to add a few words upon the question of jurisdiction. It is contended that under the provisions of the Trade Union Acts no Court has power to entertain such an action. There can be no doubt that the action is brought directly to enforce an agreement as to benefits made between a society and one of its members and depending upon the rules of the society, which is a trade union; and it is contended that inasmuch as the society is a trade union, and is sued as such,

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and as its main objects are in restraint of trade, the jurisdiction of the Courts is excluded. The plaintiff, on the other hand, relying on the case of *Swaine v. Wilson* (1), contends that, although the defendant society is a trade union by reason of the fact that one of its objects is to interfere in the relations of employer and employed, yet the rules are so largely of the type of rules of an ordinary friendly society that we may properly neglect the other objects of the society, with the result that this action would be maintainable upon the principle illustrated in that decision. No doubt there are in that case weighty expressions of opinion, especially on the part of Lindley L.J., to the effect that, although a society is a trade union, yet, if its objects are severable into trade union objects and friendly society objects, there may be cases in which an action will lie to enforce an obligation which is not in restraint of trade. This decision may, however, be contrasted with *Old v. Robson* (2), decided in the following year, where it was held that, the objects of the society not being those of a friendly society, justices had no jurisdiction to entertain the application. It appears, however, from a note at p. 44 of the report that the previous decision of *Swaine v. Wilson* (1) was not brought to the attention of the Court during the argument. We are of course bound by *Swaine v. Wilson* (1), which was a decision of the Court of Appeal, and which no doubt decided that an action would lie where the main object of the society was to provide benefits for its members, although some of its objects might be trade union objects and in restraint of trade. It seems to me a fair inference that, where the main purpose of such a society is such that a member can hardly avail himself of it without bringing into operation the purposes of the society which are in restraint of trade, an action would not lie; but that question it is not necessary now to determine. In the present case I am unable to sever the two classes of objects. The main object clearly was to protect the interests of the workman and to interfere in his relations with his employers, and though no doubt the benefits are not confined to that, but extend to allowances in respect of sickness and accidents, I am inclined to think that the society comes within s. 4.

(1) 24 Q. B. D. 252.

(2) 59 L. J. (M.C.) 41.

It is, however, unnecessary to decide that point, and I am content to rest my decision upon the first ground.

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A. T. LAWRENCE J. I am of the same opinion. The action is brought by the personal representative of a deceased member to recover certain benefits alleged to have been due to him at his death. To this there are two defences: first, that the Courts have no jurisdiction to entertain such an action; and, secondly, that the deceased member was never entitled to the benefits claimed because the rule under which they were claimed had been altered in his lifetime and he was bound by the alteration. No doubt there is room for a difference of opinion on the first point, and I prefer not to base my judgment upon it. The argument which was pressed on us with regard to *Swaine v. Wilson* (1) ignores the fact that in that case the society was not registered under the Trade Union Acts. There the question was whether the particular agreement was not enforceable because it was in restraint of trade, and the Court, after looking through the rules, came to the conclusion that it was not in restraint of trade and might be enforced. In the present case an endeavour is being made to sue a society, which is admittedly a trade union, by its registered name upon an agreement to provide certain benefits for one of its members, and such a claim seems to me to come within the exact language of s. 4 of the Trade Union Act, 1871, and therefore, without saying more, I think, as at present advised, that the Court had no jurisdiction.

Upon the other point we have had an able argument to the effect that the alteration of rule 39 was ineffective as against the deceased member, because it was made after he had become a lunatic and at a time when it was out of his power to dissent from it. The analogy was suggested of the determination of the authority of an agent, and no doubt the analogy is plausible; but it is not true, for the authority of the majority is not really that of agents. The real ground on which the power of the majority to make an alteration rests is that the original contract entered into between the society and each of its members contained a power of alteration of the rules by the stipulated

(1) 24 Q. B. D. 252.



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majority. That power is a fundamental part of the constitution of the society, and no member can claim the benefits while ignoring the existence of the rule. It is said that the deceased member acquired a vested right to the payment of 2s. a week as long as his illness lasted; but it was in truth no more than a defeasible right, which has been defeated by the alteration of the rule. The rule could be altered by virtue of rule 79, which was in existence when the deceased joined the society, and so long as he remained a member, so long was he bound by alterations of the rules duly carried out.

*Appeal dismissed; leave to appeal.*

Solicitors for plaintiff: *Burn & Berridge, for Mossman, Blankley & Co., Bradford.*

Solicitors for defendants: *Wrensted, Hind & Roberts, for Scott, Bradford.*

W. J. B.

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 May 22, 23.

# CLARE v. JOSEPH.

*Solicitor and Client—Agreement as to Costs—Attorneys and Solicitors Act, 1870 (33 & 34 Vict. c. 28), s. 4.*

An agreement by a solicitor with a client to charge him nothing for costs if he won his action, and, if he lost it, to charge only the same amount for costs as he would have recovered from the opposite party had the action been successful, is an agreement for the benefit of both the solicitor and the client, and must be in writing under s. 4 of the Attorneys and Solicitors Act, 1870.

*Jennings v. Johnson*, (1873) L. R. 8 C. P. 425, distinguished.

APPEAL from the judge of the Southwark County Court.

The action was brought to recover a sum of 14l. 0s. 4d., money had and received by the defendant while acting as the plaintiff's solicitor, and retained by the defendant in discharge of costs alleged to be due to him in that capacity. The defendant had acted as the plaintiff's solicitor in two actions brought against persons respectively named Shepherd and Hawkins. In the action against Shepherd the terms on which the present defendant acted were contained in an agreement in writing as to

costs, by which, in the event of the action being successful, he was to make no charge against the plaintiff for costs, but in the event of its being unsuccessful he was to receive from the plaintiff the same amount of costs that he would have recovered from the defendant if the action had been successful. No question arose between the parties respecting this agreement. In the subsequent action against Hawkins there was no agreement in writing as to costs, but it was alleged by the plaintiff, and was found as a fact by the jury at the trial of the present action in the county court, that the plaintiff and defendant entered into an oral agreement as to costs to the same effect as the written agreement in the action against Shepherd. In the action against Hawkins the plaintiff was successful, but the defendant, who denied that an oral agreement as to costs had been entered into, retained in his hands as costs the sum of 14*l.* 0*s.* 4*d.* out of the money recovered in that action; this sum the plaintiff now sued for. The defendant contended that under s. 4 of the Attorneys and Solicitors Act, 1870, such an agreement as that relied on by the plaintiff must be in writing. The learned county court judge gave judgment for the plaintiff, and granted leave to appeal.

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*Ricardo*, for the defendant. The agreement was one which, under s. 4 of the Attorneys and Solicitors Act, 1870, must be in writing. (1) The case of *Jennings v. Johnson* (2), which at first sight seems to be against the defendant's contention, is clearly distinguishable; for, first, the agreement in that case was that the solicitor would not charge any costs in any event; and, secondly, the attention of the Court was not directed to the whole of the section. *In re Lewis, Ex parte Munro* (3) shews the strictness with which the Courts require the bargain between

(1) By 33 & 34 Vict. c. 28, s. 4, :  
 "An attorney or solicitor may make an agreement in writing with his client respecting the amount and manner of payment for the whole or any part of any past or future services, fees, charges, or disbursements in respect of business done or to be done by such attorney or solicitor, whether as an attorney or solicitor or

as an advocate or conveyancer, either by a gross sum, or by commission or percentage, or by salary or otherwise, and either at the same or at a greater or at a less rate as or than the rate at which he would otherwise be entitled to be remunerated. . . ."

(2) L. R. 8 C. P. 425.

(3) (1876) 1 Q. B. D. 724.

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solicitor and client to be in the form of a written agreement binding on both parties.

[He was stopped by the Court.]

*J. A. Simon*, for the plaintiff. The jury have found an oral agreement between the parties by which, in the event that has happened, the plaintiff was not to pay the defendant anything in respect of costs ; it would be inequitable to allow a solicitor under such circumstances to turn round on his client and say that he was not bound because he had not signed an agreement in writing to that effect. A solicitor's bill is liable to taxation under the Attorneys and Solicitors Act, 1843 (6 & 7 Vict. c. 73), and the effect of the Act of 1870 is that, though that is still to be the rule, the parties may vary the rule by a written agreement. The provisions of s. 4, like the provisions generally of all Acts relating to solicitors, are in the interest and for the protection of the client, and there is nothing to shew that a solicitor, who is in a quasi-fiduciary relation to his client, is entitled to rely upon them. The effect of s. 4 is not to avoid agreements between solicitor and client which are not in writing, but to allow a solicitor to make a bargain regarding his costs.

*Ricardo*, in reply. The Act is not for the benefit of the client only, but for the benefit of both parties to the agreement. This is apparent from the judgment of Jessel M.R. in *In re Fernandez*. (1) [He also cited *In re Owen*. (2)]

*Cur. adv. vult.*

May 23. RIDLEY J. After careful consideration I have come to the conclusion that this appeal should be allowed. The facts are simple. There had been two actions brought by the present plaintiff against defendants respectively named Shepherd and Hawkins. In the action against Shepherd a written agreement had been entered into between the plaintiff and his solicitor, the defendant in the present action, by which the solicitor was to make no charge for costs against the plaintiff if the action was successful, while if it was lost the plaintiff was to pay to his solicitor the same amount of costs that he would have got from the defendant Shepherd had the action been successful. Nothing

(1) (1878) 22 Sol. J. 348.

(2) (1885) 52 L. T. 628.

turns upon that agreement or upon that action. In the action against Hawkins there was admittedly no written agreement as to costs, but it is alleged by the plaintiff that there was an oral agreement with his solicitor, the terms of which were the same as those of the written agreement in the former action. The present action was brought by the plaintiff against his solicitor to recover money retained by the latter for his costs in the action against Hawkins, and at the trial the existence of the oral agreement as to costs was directly in issue; the jury found that the agreement was in fact made, and we must therefore approach this case with that fact in the plaintiff's favour.

The question for our decision is whether the agreement is one which is required by s. 4 of the Attorneys and Solicitors Act, 1870, to be in writing, or whether it is one which, although oral only, the client can rely upon as an agreement for his own benefit. I am of opinion that s. 4 does apply to the present case, and that the agreement on which the plaintiff seeks to rely ought to have been in writing. The question is one of some interest, and is not covered by much authority. But in *In re Fernandez* (1) there are some observations of Jessel M.R. as to the Act of 1870 which seem to bear directly upon the present question. The plaintiff's counsel contended that the provisions of s. 4 were enacted in the interest of the client, and that, while an agreement for the benefit of the solicitor must be in writing, it was sufficient if an agreement for the client's benefit was made orally. There is, however, nothing in the Act as to the intention with which it was passed, and I cannot gather the suggested intention from its language; certainly the observations of Jessel M.R. do not favour such a contention. He says that the object of the Act was to do away with the anomaly which then existed of a solicitor being unable to agree with his client to take anything more or less than the ordinary charge; and he expresses the further opinion that the Legislature intended that the Act should be carried out so as to make solicitors act fairly with clients and vice versa, and that any agreement between them should be such as any reasonable man could understand. It seems clear to me that, in that learned judge's opinion, the provisions of the Act

(1) 22 Sol. J. 348.

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are for the benefit both of solicitor and client, and that stipulations as to the mode of a solicitor's remuneration are only valid if in writing. In that case it was held that the signature of the client in the solicitor's ledger was not sufficient to satisfy the requirements of the section, but the observations of the learned judge seem applicable to the point taken in the present case.

Was it then necessary that the agreement between solicitor and client in the present case should be in writing? In the event which has happened—the successful event of the action—no charge for costs was to be made against the client, but we have to look, not at the result of the action, but at the nature of the agreement entered into between the solicitor and client. It was not a simple agreement that the client should pay his solicitor no costs for his services, but that he should pay him no costs if he won, while if he lost he should only pay such costs as the solicitor would under ordinary circumstances have been paid if he had won. That was not an agreement on the part of the solicitor to do the client's work for nothing, but only to do it for nothing in a certain event; in one event the solicitor would be entitled to charge certain costs, in the other event he would be entitled to nothing. For that reason I think that the decision in *Jennings v. Johnson* (1) does not apply to the present case, and I confess that I do not entirely follow the reasoning of Bovill C.J. in his judgment. In that case the client set up an oral agreement by which the attorney was to charge him nothing if he lost the action, and a verdict having been returned in favour of the client, who was the plaintiff in the action, there was a motion, pursuant to leave reserved, for a rule to enter a verdict for the defendant or a nonsuit, the ground of the motion being that under the Attorneys and Solicitors Act, 1870, the agreement must be in writing. The rule was refused, Bovill C.J. saying: "The object of s. 4 was to enable the attorney in certain cases to claim more than he would otherwise be entitled to." In my opinion that does not fully describe the objects of the section, for on looking at its language it is clear that it also enables the attorney or solicitor to make an agreement to take less. In *Jennings v. Johnson* (1) the agreement of the solicitor was, not to

(1) L. R. 8 C. P. 425.

charge anything for costs, and it was held that such an agreement need not be in writing; in the present case, as I have already said, the agreement was not an absolute agreement to charge nothing, but only to do so in a certain event, which no doubt was the event which happened. For that reason I think that the present case is distinguishable on the facts from *Jennings v. Johnson* (1), and I certainly do not feel inclined to extend that decision. In my judgment the finding of the jury in the present case was ineffective, and the appeal must be allowed.

DARLING J. I am of the same opinion. The question turns upon the proper construction of the first part of s. 4 of the Act of 1870. It has been contended for the plaintiff that the meaning of the section is that, if a solicitor seeks to take advantage of it, he can only do so by relying upon an agreement in writing, but that the section has no application to the case of a client, who may rely upon an oral agreement. It seems to me plain upon the language of the section that we cannot come to any such conclusion; the section provides for an agreement in writing in cases where a solicitor agrees to charge at a less rate, as well as in cases where he is to be at liberty to charge at a greater rate than that at which he would otherwise be entitled to be remunerated for his work. I cannot imagine a solicitor setting up an agreement in writing to take remuneration at a less rate than he would be entitled to charge; it would be against his interest to do so: the only person interested in setting up such an agreement would be the client, and if the respondent's contention as to the meaning of the section is sound, it would have been quite unnecessary to deal with an agreement to take a less rate. The case of *Jennings v. Johnson* (1) appears to conflict to some extent with this view, and we have been practically asked to reconsider it, a course which we have no power to take if by reconsidering it the suggestion is that we should differ from it. That decision simply comes to this: that if a solicitor makes an agreement with his client to give his services for nothing, the case will not come within s. 4 of the Act of 1870, and the agreement need not be in writing. Such an agreement would not, to use the words of the section, be an agreement "respecting the amount

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and manner of payment," because it is an agreement that the client shall not pay anything, and the decision is an authority that such an agreement is altogether outside the statute. I agree that the observations of Bovill C.J. were incomplete, for he omitted to notice that part of the section which authorizes an agreement by a solicitor to take less than the charges which he would otherwise be entitled to make. That decision does not seem to have been cited in *In re Fernandez* (1), where Jessel M.R. gave expression to a view of the section which is certainly inconsistent with that expounded by Bovill C.J.; he placed upon its language an interpretation which I should have thought would have been almost universally considered the natural one, and which regards the section as regulating the mode in which two persons bargaining are to make an effective agreement. The plaintiff contends that this is not the proper view of the section; that regard must be had to the fact that it relates to bargains between solicitor and client; that the solicitor stands in a quasi-fiduciary relation to his client; that the section is intended for the client's protection; and that it is fair and proper that the solicitor should be compelled to make an agreement in writing while his client may rely upon an oral agreement. It would have been easy for the Legislature to have said this in plain language, had they meant it. In my judgment they have said nothing at all approaching it; the bargain is to be expressed in writing, and words are used which in my view place both parties on the same footing, and this is the view to which Jessel M.R. gave expression only a few years after the passing of the Act. It is not necessary for us to decide anything in the least contrary to, or inconsistent with, *Jennings v. Johnson* (2), which dealt with an agreement that the client was not to be liable to pay costs in any event. That case is distinguishable, and a fuller view of the statute is in my opinion to be found in the judgment in *In re Fernandez*. (1) I agree that this appeal should be allowed.

*Appeal allowed; leave to appeal.*

Solicitors for plaintiff: *Hicklin, Washington & Pasmore.*

Solicitor for defendant: *Hyam Joseph.*

(1) 22 Sol. J. 348.

(2) L. R. 8 C. P. 425.

## [IN THE COURT OF APPEAL.]

## LEWIS v. BAKER.

C. A.

1906

July 5.

*Landlord and Tenant—Notice to Quit—Tenancy at Yearly Rent—Habendum  
“until such tenancy shall be determined as hereinafter mentioned”—  
Provision for Three Months' Notice to Quit—Expiration of Notice.*

By an agreement of tenancy a public-house was let from a certain date “until such tenancy shall be determined as hereinafter mentioned” at a yearly rent of 70*l.*, clear of all deductions except land and property tax, payable quarterly on certain named days, the tenant agreeing (inter alia) to keep the premises in repair. The agreement contained a provision that it should be lawful for either party “to determine the tenancy hereby created by giving to the other of them three calendar months' notice in writing for that purpose” :—

*Held*, that the agreement created a yearly tenancy determinable by three months' notice expiring with any year of the tenancy, and not a tenancy for an indefinite term determinable by a three months' notice expiring at any time.

APPEAL from the judgment of Jelf J. at the trial without a jury. (1)

The plaintiff, as assignee of one Thomas Morris, brought this action to recover possession of a public-house. By an agreement of tenancy dated June 1, 1901, Morris let the public-house in question to the defendant for a term thus expressed in the habendum: “To hold the same unto and by the said John Baker from the 13th day of May last until such tenancy shall be determined as hereinafter mentioned at the yearly rent of 70*l.*, clear of all deductions except land and property tax, such rent to be paid by equal quarterly payments on the 13th day of August, the 13th day of November, the 13th day of February, and the 13th day of May in every year.” By the agreement the defendant was to keep the premises in repair, and also to keep them open at all lawful hours as a licensed house, to apply when necessary for a renewal of the licences, and at the determination to deliver up the premises, fittings, fixtures, and stock at a valuation. It was further provided that the defendant might be ejected in the event of his being convicted of any offence involving the indorsement of the licence; and finally it was agreed that “it shall be



C. A.      lawful for either of the parties to determine the tenancy hereby  
1906      created by giving to the other of them three calendar months'  
LEWIS      notice in writing for that purpose."

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On May 11, 1903, Morris, the lessor, gave to the defendant a written notice to quit on August 13, 1903. This notice to quit was not complied with, and subsequently Morris assigned all his interest in the premises to the plaintiff.

Jelf J. held that the notice to quit was bad, and gave judgment for the defendant. The plaintiff appealed.

*J. R. Atkin*, for the plaintiff. The notice to quit was good. The agreement did not create a yearly tenancy, but a tenancy determinable at any time by a three months' notice. In the case of a licensed house it is necessary for the lessor to be able to get rid of the tenant at a short notice if the tenant proves undesirable or the business of the house is not being profitably carried on. The case is governed by *Doe d. King v. Grafton* (1), where it was held that an agreement that the tenant should hold the premises at a yearly rent "until one of the said parties shall give unto the other six calendar months' notice" was determinable by a notice not expiring at the end of the year. There, as here, the rent was payable quarterly on specified days, and the tenant covenanted to pay the rates and taxes and to repair, but it was nevertheless held that those facts did not make the tenancy a yearly one. The only difference between the two cases is that in *Doe d. King v. Grafton* (1) the notice upon which the agreement was determinable was specified in the habendum itself, whereas here it is only contained in the habendum by reference to the clause at the end of the agreement "until such tenancy shall be determined as hereinafter mentioned." But that can make no substantial difference. The habendum must be read as if the clause as to notice were included in it. The case of *Dixon v. Bradford, &c. Coal Supply Society* (2), upon which the defendant relied in the Court below, is plainly distinguishable, for in that case there was no provision that the tenant should hold until notice to quit had been given and had expired; it was an informal agreement without any habendum at all.

(1) (1852) 18 Q. B. 496.

(2) [1904] 1 K. B. 444.

*Bankes, K.C.*, and *Kimber*, for the defendant. The tenancy here is a yearly tenancy with the substitution of a three months' notice for the ordinary six months' notice; and the shorter notice, like the longer one, must expire with a year of the tenancy. In *Doe d. King v. Grafton* (1) there was no term at all; it was a mere tenancy at will. The language in that case was very different from the language in the present. There it was "until one of the parties shall give . . . notice in writing to quit." Here it is "until such tenancy shall be determined." Those words import a tenancy the term of which is not necessarily limited by the notice to quit, but is independent of it. And the words in the clause as to notice, "the tenancy hereby created," point to the same conclusion. What that term is must be gathered from the agreement as a whole; and the fact that the rent was spoken of as a "yearly rent," and was payable quarterly on named quarter days, and that the covenants generally were such as are more usually to be found in connection with a yearly tenancy than with a tenancy for a shorter term, suggest that a yearly tenancy was what was intended by the parties. The words "until such tenancy shall be determined as hereinafter mentioned" mean nothing more than "determinable as hereinafter mentioned." [He cited *King v. Eversfield*. (2)]

*Atkin* in reply.

LORD ALVERSTONE C.J. I entirely concur with the judgment of my brother Jelf, and with the reasons upon which his decision is based. The agreement in question is very inartistically drawn, and we are called upon to say whether it ought to be construed as creating a yearly tenancy determinable by a three months' notice, or as creating a tenancy for an indefinite time terminating with the expiry of a three months' notice at whatever date that notice may be given. The landlord is thereby expressed to let the premises to the defendant "To hold the same . . . from the 13th day of May last until such tenancy shall be determined as hereinafter mentioned." It has been strenuously contended that those words are sufficient to enable us to say that no tenancy was thereby created except an indefinite one from May 13

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(1) 18 Q. B. 496.

(2) [1897] 2 Q. B. 475.

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until the expiry of the notice. But if that is what the parties meant, the words "such tenancy" are clearly not apt words, because up to that point no tenancy has been expressed. The agreement then goes on, "at the yearly rent of 70*l.* clear of all deductions except land and property tax, such rent to be paid by equal quarterly payments on the 13th day of August, the 13th day of November, the 13th day of February, and the 13th day of May in every year." Then follow certain clauses as to repairs and the applying for the renewal of licences, as to which I do not attach much importance, for one knows that such clauses are sometimes inserted in agreements for quarterly tenancies, and therefore there is nothing inconsistent with Mr. Atkin's contention in the mere presence of those clauses in this agreement. At the same time they are clearly more in harmony with a yearly tenancy than with a quarterly one. Nor do I attach much importance to the fact that the tenant is to pay the rent clear of all deductions, or, in other words, is to pay the rates, for such a provision is frequently to be found in a quarterly agreement. Then we come to the clause on which Mr. Atkin relied: "And also that it shall be lawful for either of the parties to determine the tenancy hereby created by giving to the other of them three calendar months' notice in writing for that purpose." It seems to me that the language of that clause is not consistent with Mr. Atkin's contention. The words "the tenancy hereby created" point to a tenancy already created by the earlier part of the agreement and without reference to the power of determining it by notice. Looking at this agreement as a whole with its ambiguities of expression, coupled with the provision as to yearly rent and quarterly payments, I think it is more reasonable to construe it as creating a yearly tenancy, and to regard the words "until such tenancy shall be determined as hereinafter mentioned" as an inartistic mode of saying "the tenancy being determinable as hereinafter mentioned." It has been contended for the plaintiff that *Doe d. King v. Grafton* (1) is a direct authority in his favour; but when it is carefully examined I do not think that it is. There the words were, "the said H. Grafton shall and may hold and enjoy" the premises "until

one of the said parties shall give unto the other six calendar months' notice in writing to quit at the expiration of any such notice." That clause is very different from the present. It does not contain any such ambiguity as that which attaches to the expressions "such tenancy" and "the tenancy hereby created" in the agreement before us.

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SIR GORELL BARNES, PRESIDENT. I agree, and for the reasons given by my Lord. It was argued for the plaintiff that the case was covered by *Doe d. King v. Grafton*. (1) But it appears to me that that is not so, for the terms of the agreement in that case left it open to the Court to say that the terminus of the holding had been definitely stated in the habendum, which is not the case here. I think that there would have been more force in the plaintiff's contention if the clause with regard to the termination of the tenancy had said that it should be lawful for either party to determine it by giving to the other a three months' notice at any time.

FARWELL L.J. I also am of opinion that Jelf J. was right. If the habendum had run "to hold the same from the 13th day of May until notice to quit shall be given as hereinafter mentioned," there would have been a term certain during which the tenancy would last, as in *Doe d. King v. Grafton*. (1) But here the words are "from the 13th day of May last until such tenancy shall be determined." There is here no term definitely created by the habendum, but a term assumed to be already in existence, during which the tenancy is to last, which term is to be determinable as thereafter mentioned.

*Appeal dismissed.*

Solicitors for plaintiff: *Simmons & Simmons, for Gwilym Jones, Mountain Ash.*

Solicitors for defendant: *Kimber & Edwards, for J. W. Edwards, Aberdare.*

(1) 18 Q. B. 496.

J. F. C.



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[IN THE COURT OF APPEAL.]

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July 7.

## KEMP AND OTHERS v. BAERSELMAN.

*Contract—Assignability—Contract to supply Goods as Purchaser may require for his Business—Agreement by Purchaser not to buy similar Goods from others—Assignment of Purchaser's Business—Right of Assignee to require supply of Goods from Vendor.*

The defendant contracted with K., a cake manufacturer, to supply him with all the eggs of a specified quality "that he shall require for manufacturing purposes for one year," K. undertaking not to purchase eggs from any other merchant during the year so long as the defendant was ready to supply them. During the year K. transferred his business to a company, whereupon the defendant claimed to be discharged from his contract, and refused to supply any more eggs either to K. or to the company. In an action brought by K. and the company, as co-plaintiffs, for breach of the contract:—

*Held*, that the defendant's contract was with K. personally, that the benefit of it was not assignable, and that the defendant was discharged from his obligation.

*Tolhurst v. Associated Portland Cement Manufacturers*, [1903] A. C. 414, distinguished.

APPEAL by defendant against a judgment of Channell J and cross appeal by plaintiffs.

The plaintiff George H. Kemp was previously to the assignment hereinafter mentioned a cake manufacturer, carrying on business at two places in London (Annette Road, Holloway, and Martineau Road), and having a depot at Cardiff. The defendant was a provision merchant. By an agreement dated March 24, 1904, made between G. H. Kemp and the defendant it was agreed as follows:—

1. "Baerselman agrees to supply and Kemp agrees to accept all the fresh shell eggs Star Wreaths or equal to Star Wreaths that he shall require for manufacturing purposes for one year from April 1, 1904, to April 1, 1905," at certain specified prices.

3. "The said Baerselman agrees to deliver all shell eggs . . . to either of Kemp's London factories free of charge and all goods for Kemp's Cardiff depot free on rail or boat."

4. "Every 14 days a statement of account is to be rendered

and after being checked and found correct Baerselman to draw for the amount at two months from date of delivery."

5. "During the continuance of this agreement or so long as the said Baerselman shall continue to supply sound fresh eggs satisfactorily to the said Kemp the said Kemp undertakes not to purchase eggs from any other merchant."

In July, 1904, G. H. Kemp purchased the business of a company called the National Bakery Company, carrying on business at Brewery Road, London, N., and at the same time transferred the said business, together with his business at Annette Road and at Cardiff, to a new company called George Kemp, Limited, the business at Martineau Road being abandoned. By the terms of the amalgamation of the said businesses the shareholders in the National Bakery Company received as the purchase-money of their business 29,000*l.* of debentures in George Kemp, Limited, and the whole of the ordinary share capital of George Kemp, Limited, consisting of 20,000 shares of 1*l.* each, was, with the exception of seven shares, taken by G. H. Kemp, who acted as the manager of the amalgamated businesses.

On September 7 notice of the amalgamation was given to the defendant, who on September 17 wrote to G. H. Kemp, "As the whole of your business and everything belonging to you is now merged in the limited company by your own admission, George H. Kemp as a trader is dead, and consequently the agreement is at an end"; and he accordingly refused to supply any more eggs under the agreement. Thereupon G. H. Kemp and George Kemp, Limited, joined as co-plaintiffs in bringing this action for breach of the agreement, and claiming damages for non-delivery of eggs at Brewery Road as well as at Annette Road and at Kemp's Cardiff depot.

The question of liability, which was ordered to be tried first, was tried before Channell J. without a jury. The judge held on the construction of the agreement that G. H. Kemp was entitled to a supply of eggs for the purposes of the business that he was carrying on at certain defined places, and that the benefit of that agreement was assignable, and passed by the transfer of the business to the plaintiff company, though the liability to pay for them remained with the plaintiff

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G. H. Kemp. He held accordingly that the plaintiffs were entitled to recover damages for the refusal to deliver eggs at Annette Road and at the Cardiff depot, but not in respect of the refusal to deliver at Brewery Road. Both parties appealed.

*Scrutton, K.C.*, and *Herbert Jacobs*, for the defendant. The defendant's contract was with Kemp personally. It was limited to his personal requirements—"that he shall require." That was the only limit. The supply was not restricted to manufacture carried on at any particular place, it was to meet his requirements "for manufacturing purposes" generally. And it may be that under the contract, if Kemp had taken another factory in addition to those which he had already got, and had carried on business there himself, he would have been entitled to a supply of eggs for that additional factory. But he ceased to carry on business at all. The contract being personal to Kemp, the benefit of it was not assignable to the company. Where there is a contract to supply goods and the quantity to be supplied is undefined except by reference to the requirements of the purchaser, it is obvious that the contract cannot be assigned. "The measure of an original contractor's requirements may be very different in a given case from those of a substituted person. In such a case clearly the original contractee could not insist on his contractor furnishing a supply equal to the requirements of the substitute, and could not prove that he required it himself": per *Collins M.R.*, *Tollhurst v. Associated Portland Cement Manufacturers*. (1) In that case it was indeed held by the Court of Appeal, and affirmed by the House of Lords (2), that where an owner of chalk quarries contracted to supply a certain cement company with as much chalk as the company should require for the whole of their manufacture of Portland cement upon their land near the quarries, the benefit of that contract was assignable by the company although the company's assigns were not mentioned in the contract. But that case is distinguishable upon the ground that there the capacity of the company's land and the machinery thereon rather than anything personal to the company was the measure of the quantity to be supplied. Moreover, in the present case there is this additional reason for holding the

(1) [1902] 2 K. B. 660, at p. 672.

(2) [1903] A. C. 414.

contract not to be assignable. The judge below held rightly that, in the absence of any evidence of a novation, the obligation to pay for the eggs, assuming the contract to be still subsisting, remained with Kemp, the assignor. But the terms upon which the businesses were amalgamated, involving a preferential charge in favour of the National Bakery Company's shareholders upon the profits of Kemp's business, might materially affect his capacity to pay, and by the terms of the defendant's contract the eggs were to be supplied on credit. That consideration alone would shew that from and after the transfer of the business to George Kemp, Limited, the defendant's contract was at an end.

*J. A. Hamilton, K.C.*, and *Macoun*, for the plaintiffs. As to the defendant's appeal. As Kemp is the owner of the whole share capital of the new company, and continues as before to manage the business, the only effect of the amalgamation is that he has enlarged his business by means of borrowed capital. The business at Annette Road is Kemp's business. But, even assuming that George Kemp, Limited, is a distinct person from G. H. Kemp, the benefit of the contract with the defendant was assignable by him to the company. The benefit of a mercantile contract for the supply of goods is always assignable unless it is expressed to be personal: *Tolhurst v. Associated Portland Cement Manufacturers*. (1) Here there is nothing restricting the benefit of the contract to G. H. Kemp. The words "that he shall require for manufacturing purposes" mean "that shall be required at Annette Road." To limit the quantity to be supplied by reference to his personal requirements is to read into the contract something which is not there.

As to the plaintiffs' cross appeal. The plaintiffs are entitled to damages for the non-supply of eggs to the bakery at Brewery Road which was substituted for the abandoned bakery at Martineau Road. What difference does it make whether the business was carried on at Martineau Road or at substituted premises in another street?

LORD ALVERSTONE C.J. With regard to the subject of the plaintiffs' cross appeal I think that Channell J. was clearly right,

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and that even if the benefit of the contract was assignable so far as it related to the supply of eggs to the businesses carried on by G. H. Kemp, still the plaintiffs could not in any event claim to have a supply for the Brewery Road business, for Kemp never carried on business there, and consequently never had any requirements for that business. But, with regard to the defendant's appeal, I regret to have to differ from Channell J., and the reasons why I differ from him are these: He seemed to be of opinion that, because this was a contract for the supply of an ordinary marketable commodity like eggs, the benefit of the contract could be assigned, and that it made no difference to the defendant who the persons were to whom the eggs were to be supplied by him. He did not anywhere in his judgment deal with clause 5—the clause whereby the purchaser bound himself not to buy eggs from any other persons—and did not sufficiently consider the personal element which that clause introduced. I can find nothing in the judgments in *Tolhurst's Case* (1) in the House of Lords which can be interpreted as laying down the general principle for which Mr. Hamilton contended, namely, that the benefit of any contract of this kind can be assigned. What the House of Lords did say in that case was that in that particular case the contract for the supply of chalk for fifty years was to be treated as a contract for the supply to a given cement-making place, and not a personal contract. But there is nothing that I can see in the present contract which enables me to say that it is a contract to supply eggs to a particular place. The first clause provides that Baerselman shall supply, and Kemp shall accept, all the fresh eggs that he, Kemp, shall require for manufacturing purposes for one year. Then by clause 5 Kemp undertakes not to purchase eggs from any other merchant. That, as I have said, imposes a personal obligation upon the purchaser which may be very material to the contract. It is not seriously contended that Kemp, Limited, or any other assignee would be bound by that obligation unless there was something amounting to a novation; and here there was no evidence of a novation. I think this contract was not one the benefit of which can be assigned simply by a sale of the business, and that when the facts

(1) [1903] A. C. 414.

which were proved had become known to Baerselman he was entitled to refuse to continue the supply. I am not altogether satisfied that there is not also an argument in support of the defendant's contention to be based on the terms of payment, though I do not attach so much importance to it, because it may be that, when the authorities come to be examined, it will be found that the Courts have treated the question of payment as one which does not prevent the benefit of a contract from being assignable. I only mention it so that in the event of the case going further it may not be thought that it has been overlooked. I base my decision on the ground that clauses 1 and 5 shew that the contract was a personal one, the measure of the defendant's obligations as to supply being the extent of Kemp's personal requirements, and the undertaking by Kemp not to buy eggs of other merchants being an undertaking which was purely personal to himself. The defendant's appeal, therefore, must be allowed.

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SIR GORELL BARNES, PRESIDENT. With regard to the cross appeal of the plaintiffs, I do not wish to add anything to what has fallen from my Lord. With regard to the defendant's appeal, I think that as the Court is differing from the view taken by Channell J., it is desirable that I should express very shortly how the matter appears to me. I think that his judgment is based upon the elimination altogether of any consideration of a personal element in this contract, and that he has treated it as if it made no difference by whom or to whom the goods were supplied. That is a matter upon which, having regard to the terms of this contract, I feel compelled to differ from him. In my opinion the contract was intended to be a personal one, for in the first place the goods were to be supplied "as Kemp shall require for manufacturing purposes"; and, secondly, during the continuance of the agreement, and so long as the seller should supply eggs according to the contract, Kemp undertook not to purchase eggs from any other merchant. How that latter provision can be read so as to give the benefit to the vendor when the contract is assigned to another purchaser I fail to see. With regard to the case relied

C. A. 1906 <hr/> KEMP <i>v.</i> BAERSEL- MAN. <hr/> The President.	upon by Mr. Hamilton, <i>Tolhurst v. Associated Portland Cement Manufacturers</i> (1), it is sufficient to say that a great difference of opinion prevailed with regard to that case. Mathew J. decided the case one way, and the Court of Appeal decided it another, and there was a difference of opinion in the House of Lords; and ultimately I think the decision proceeded upon the reasons expressed by Lord Macnaghten at p. 420, where he says: "The contract is a contract for the mutual benefit and accommodation of the chalk quarries and the cement works, and of Tolhurst and the company as the owners and occupiers of those two properties. Construed fairly, the provision in clause 2, about which there was so much argument, means I think nothing more than this—that the Imperial Company was to take the whole of the supply of chalk required for the Northfleet works (the quantity to be ascertained by daily orders, but guaranteed not to be less than 750 tons per week) from Tolhurst's chalk quarries, and from no other source whatever. As long as that is done how can it matter who is carrying on the works?" In this case it seems to me to make a very considerable difference who is carrying on the purchaser's side of the contract. I agree that the appeal should be allowed.
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FARWELL L.J. In my opinion this agreement contains two considerations moving to the defendant, one being the payment of the price, and the other being Kemp's undertaking not to purchase eggs from any other merchant. It is obvious that the value of the latter consideration must in a large measure depend upon the person who gives the undertaking and the business carried on by him, and to that extent the personal element enters into the question. And as regards payment, it is conceded that novation cannot be compulsory so as to make the person supplying the goods accept against his will the liability of another person to pay for them in substitution for the liability of the original purchaser; so that in that respect also the contract is personal. And, thirdly, the contract contains a personal element in that the quantity to be supplied is measured by the requirements of Kemp himself. When he

assigned his three businesses to the new company one of them was given up and a much larger business taken in its place. That fact brings into prominence the importance of the provision in clause 1 that the defendant shall supply to Kemp as many fresh eggs as "he shall require for manufacturing purposes." The requirements of Kemp for manufacturing purposes are one thing, and the requirements of anyone to whom Kemp may assign his business are another. In *Tollhurst's Case* in the Court of Appeal (1) the Master of the Rolls laid stress on the fact that "The measure of an original contractor's requirements may be very different in a given case from those of a substituted person," and said that when that is the case "the contract would be personal and could only be fulfilled by the contractee himself." That appears to me to apply with great force to clause 1 in the present case. And I do not find here anything to indicate that the supply was to be measured by the requirements of the business at a particular specified place, as was found to be the case in *Tollhurst's Case*. (2) I cannot read clause 3 as in any way limiting the generality of clause 1. The object of clause 3 was simply to specify the extent to which the cost of carriage of the goods was to be borne by the vendor. In my opinion the benefit of this contract was not assignable, and the appeal of the defendant must consequently be allowed.

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 Farwell L.J.

*Judgment for the defendant on appeal and cross appeal.*

Solicitors for plaintiffs: *Carr, Tyler & Overy.*

Solicitors for defendant: *Rowe & Maw.*

(1) [1902] 2 K. B. 660, at p. 672.

(2) [1903] A. C. 414.



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*May 9 ;  
July 19.*CHORLEY CORPORATION *v.* NIGHTINGALE.*Highway—Ditch alongside of—Whether part of Highway—Extent of  
Dedication.*

There is no rule of law that a ditch running alongside a highway between the road and the fence cannot be dedicated as part of the highway merely because it is not part of the roadway and cannot be used by the public for purposes of passage.

## APPEAL from the Chorley County Court.

The defendant was the owner of certain land abutting on a street called Pilling Lane, within the borough of Chorley. The corporation of Chorley, as being the urban sanitary authority of the borough, served the defendant with notice under s. 150 of the Public Health Act, 1875, requiring him to pave, flag, channel and make good those parts of the street on which the premises abutted. The defendant not having complied with the notice, the corporation executed the work and demanded payment from the defendant of the sum of 256*l.* 16*s.* 10*d.*, as being his proportion of the expenses of executing the said work. The defendant neglected to pay the same, and the corporation thereupon brought their action in the county court of Chorley claiming a declaration under s. 257 of the Public Health Act, 1875, that the said sum was a charge upon the defendant's said land, and for an order for enforcing the said charge by sale. The defence was that Pilling Lane was a highway repairable by the inhabitants at large, and that consequently s. 150 had no application. The county court judge found to the contrary, and gave judgment for the plaintiffs. The defendant appealed.

On the hearing of the appeal it was admitted by the counsel for the plaintiffs that Pilling Lane was a highway repairable by the inhabitants at large; but it was contended that the roadway had been recently widened by, amongst other things, the filling up of a ditch that ran alongside the road between the roadway and the fence, and by the addition of the ditch so filled up to the area of the roadway; that this added portion of the roadway was not repairable by the inhabitants at large,

and that the case consequently fell within the last clause of s. 150, which provides that "The same proceedings may be taken, and the same powers may be exercised, in respect of any street or road of which a part is or may be a public footpath or repairable by the inhabitants at large as fully as if the whole of such street or road was a highway not repairable by the inhabitants at large." The case was remitted to the county court for the trial of the issue whether the street had been widened. It appeared that on the opposite side of the road to that on which the defendant's land lay was some land belonging to the Chorley Colliery Company, which land sloped towards Pilling Lane and formed a watershed. The ditch which existed in Pilling Lane was the natural waterway for this watershed, and the whole of the water from the watershed naturally and of necessity drained into the ditch. The ditch was wholly situated within the area contained between the old fences of Pilling Lane. The water collected and passed along this ditch for a certain distance and was then conveyed under and across Pilling Lane by a conduit on to the defendant's land. The said ditch and conduit were constructed for the passage of the said water and were essential to the existence of Pilling Lane, and formed a necessary part of Pilling Lane as a highway. A pipe was placed in the ditch for the purpose of conveying the water to the conduit above mentioned, and the ditch was begun to be filled up, in 1885, and the filling up was completed and the site of the ditch added to the roadway in 1894. The judge found that there had been a dedication of the whole area between the two original fences or boundaries of Pilling Lane, and that the filling up of the ditch consequently did not amount to a widening of the highway. It was also contended before him that the highway had been widened on the colliery company's side by reason of the fence having been set back in certain places to the extent of about 2 ft. 6 in. But on that point the judge found that there had been a corresponding contraction of the highway by bringing the fence forward in certain other places, and that it was a give-and-take arrangement for the purpose of straightening the line of Pilling Lane; and he held that this slight alteration of the line of the fence did not amount to a widening

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of the highway. He accordingly gave judgment upon the issue in favour of the defendant. The plaintiffs appealed.

*Macmorran, K.C.*, and *Fleetwood Pritchard*, for the appellants. There was no evidence on which the county court judge could properly find that the highway had not been widened. The ditch formed no part of the highway. A ditch cannot be dedicated to the public; for the object of dedication is to give the public a right of passage over the locus in quo, and a right of passage cannot be exercised over a ditch. The origin of a ditch is that pointed out by Holroyd J. in *Doe d. Pring v. Pearsey* (1): "Generally speaking, where an inclosure is made, the party making it erects his bank and digs his ditch on his own ground, on the outside of the bank. The land which constitutes the ditch in point of law is a part of the close, though it be on the outside of the bank." A ditch is the property of the adjoining owner, and is equally so where it runs alongside a highway. The mere fact that it is used for draining the water from the road does not make it a part of the highway. In *Field v. Thorne* (2) it was held that the erection of a fence on the site of an unenclosed ditch did not constitute an encroachment on the highway within s. 51. of the Highway Act, 1864. Then, if the highway has been widened by the addition of the ditch, the respondent is liable for the expense of making up the whole width of the road, and not merely the added portion: *Evans v. Newport Urban Sanitary Authority*. (3)

*Danckwerts, K.C.*, and *R. Cunningham Glen*, for the respondent. Whether a ditch is part of the highway is a question of fact. There was no evidence here when the ditch was made. That a ditch may be part of the highway is one of the commonplaces of highway law. By s. 67 of the Highway Act, 1835, the surveyor of highways is empowered to keep open and cleanse all ditches adjoining the highway, while s. 68 makes it an offence for the owner to interfere with the ditches after they have been taken under the charge of the surveyor. And s. 11, sub-s. 6, of the Local Government Act, 1888, vests all drains belonging to

(1) (1827) 7 B. & C. 304, at p. 307. (2) (1869) 20 L. T. 563.

(3) (1889) 24 Q. B. D. 264.

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a main road in the county council. The Court is concluded by the finding that the ditch was a part of Pilling Lane. Secondly, even if the ditch was not part of the highway, the appellants had no power to charge the respondent with the cost, for his land did not adjoin or abut on the ditch: *Wakefield Sanitary Authority v. Mander*. (1) The expense should have been charged to the colliery company. In *Property Exchange, Ltd. v. Wandsworth Board of Works* (2) it was held that where an old street repairable by the inhabitants at large is widened by the addition of a strip on one side the expense of paving the added strip must be apportioned on the owners of property abutting on that strip, not upon the owners of property abutting on the old street.

*Macmorran, K.C.*, in reply. In the last-mentioned case it was only the added strip that was made up. Here it was the whole road, including the old highway. And as in such case the whole expenses may be charged on the frontagers—*Evans v. Newport Urban Sanitary Authority* (3)—the frontagers on both sides of the highway are liable to contribute.

July 19. The judgment of the Court (Kennedy and A. T. Lawrence JJ.) was read by

KENNEDY J. In this case the appellants ask the Court to reverse a decision of the county court of Lancashire, held at Chorley, that the respondent could not be charged with a share of certain expenses incurred by the local authority in paving and otherwise making up a portion of a road or street called Pilling Lane.

The question raised by the appeal turns upon the applicability of the latter portion of s. 150 of the Public Health Act, 1875, to the facts of this case. On a prior appeal from the county court in this action it had already been decided that Pilling Lane is an ancient highway repairable by the inhabitants at large. The question which was then left open by the Divisional Court was whether the road or street, on which the work, to the cost of which the respondent is alleged by the appellants to be liable as

(1) (1880) 5 C. P. D. 248.

(2) [1902] 2 K. B. 61.

(3) 24 Q. B. D. 264.



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a frontager to contribute, was executed, ought to be treated as a road or street which consists partly of a highway and partly of added roadway so as to constitute a street or road of which only a part is repairable by the inhabitants at large within the meaning of the concluding portion of s. 150, and therefore a street or road in respect of which, according to the concluding words of that section, the same proceedings may be taken and the same powers be exercised as fully as if the whole of such street or road was a highway not repairable by the inhabitants at large. The learned county court judge by his judgment has negatived this proposition. Hence the present appeal.

The contention of the appellants is based upon the following facts: The old highway, so far as it could actually be used either by foot passengers or vehicles—the roadway, as I will call it—was bounded by a ditch some eight feet broad and four feet deep. This ditch bordered the roadway on the further side of the roadway from the respondent's land. The whole space, including both roadway and ditch, known as Pilling Lane, has from the first been situated within the line of fences, that is to say, there has always existed a hedge or fence both on the side of the respondent's land and on the opposite side, where the land abutting upon the ditch is now owned by the Chorley Colliery Company; and the whole space between the old fences has always been delineated and described as Pilling Lane. The ditch was necessary for the preservation of the roadway. The land on the side owned by the Chorley Colliery Company slopes downwards towards the road, and the whole of the water from this watershed has naturally drained into the ditch. The water used to pass along the ditch for a certain distance, and was then conveyed under and across the roadway by a conduit on to the land of the respondent. Within the last twenty years a pipe has been placed in the ditch, and the ditch has gradually been filled up. This, of course, has added the width of the ditch to the roadway as a space which can be traversed by foot passengers and by carriages. Further, in recent times lessees of the land of the Colliery Company, who have built cottages along their side of Pilling Lane, have for the convenience of their tenants altered the line of boundary on their side of Pilling Lane by withdrawing it

for a space of about 2 ft. 6 in. from the outer edge of the ditch on that side. No material alteration has been made in the line of the ancient fence of Pilling Lane on the respondent's side of Pilling Lane. In this state of facts the contention of the appellants was in the first instance twofold. It was based partly on the 2 ft. 6 in. addition to the area of Pilling Lane which I have just mentioned and partly upon the filling up of the ditch, and the consequent increase of the traversable roadway by some eight feet of width. But in the argument addressed to us by the learned counsel for the appellants the 2 ft. 6 in. extension—which the learned county court judge calls “the slight alteration to Pilling Lane on the colliery side”—was not seriously insisted upon as a material point in the case. The appeal was rested upon the “widening,” as it was called, of the road by the addition to the space, which was admitted to be an ancient highway, of the surface area created by the filling up of the ditch.

I am not prepared to say that the decision of the learned county court judge is wrong in point of law. So far as it is a judgment of fact, if there was any evidence to support it, this Court cannot reverse it. He has found, after hearing the evidence and viewing the locality, that the ditch was wholly situated between the old fences of Pilling Lane; that the ditch and conduit were constructed for the passage of water flowing down from the watershed, and were necessary to the existence of Pilling Lane and formed a necessary part of Pilling Lane as a highway; that there has been a dedication of the whole area between the two original fences of Pilling Lane; and that Pilling Lane has not been widened. The principal argument of the appellants' counsel was that a ditch cannot in point of law be treated as part of the land dedicated to the public as a highway. It was argued that land cannot be treated as part of the highway which cannot be travelled over by the foot or (if it be a carriage-way) by the carriage of the traveller. We are not persuaded of the correctness of this view. It appears to us that the whole of a space including a ditch may be dedicated to the public as a highway, the ditch being treated as an obstruction or excavation, subject to which, so long as the obstruction or excavation

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continues to exist, the highway is dedicated, but the surface of which, if by natural or other causes the ditch is filled or silted up wholly or partially, thereupon becomes wholly or pro tanto land which must be treated as part of the original highway. We do not see how the colliery company or their predecessors in title could legally have extended their boundary to the roadway side of the ditch, and so enclosed the area of the ditch, even if by a system of drainage they had rendered the maintenance of the ditch unnecessary for the preservation of the roadway itself.

Counsel for the appellants in support of his argument referred the Court to the case of *Field v. Thorne* (1), where it was held that the highway did not include an open and unenclosed ditch by the side of it, and to ss. 67, 68 of the Highway Act, 1835. In our judgment, however, the facts as they have been found to exist here do not allow of the applicability either of the case or of the statutory provisions so cited to us. The area of this ditch is not unenclosed, nor by the side of the highway, but, according to the learned county court judge's finding, was situate within the dedicated space lying between the old original fences. We assume that, as is stated in Lumley's Public Health, 6th ed. p. 530, the only presumption of the extent of the highway as including the entire space between the fences is a presumption in regard to so much of that space as is capable of being used for passage (see *Reg. v. United Kingdom Telegraphic Co.* (2) and the other cases collected in the text): but, as we have already said, we do not see any legal objection to the proof of such a dedication of the whole space, although it includes part which for the time being may not be able to be used for passage, as the county court judge has found as a fact in the present case; nor do we see any established principle of law or judicial decision which compels us to hold, if the obstruction or excavation which for a time has practically prevented the use of the whole space for passage disappears, that the inclusion of the formerly obstructed or excavated portion which thereupon ensues must be treated as an addition to the highway so as to cast an obligation upon the frontagers under the concluding portion of s. 150 of the Public Health Act, 1875.

(1) 20 L. T. 563.

(2) (1862) 3 F. &amp; F. 73.

As we have come to the conclusion that the judgment below ought to be affirmed on the grounds which we have stated, it is unnecessary to express any opinion upon the respondent's further contention that, as his property abutted only on that part of Pilling Lane which was unquestionably a highway repairable by the inhabitants at large, and the alleged widening was on the other side of that part, he was not in any case under the liability to contribute as a frontager to the improvement expenses, for which the appellants, relying especially upon the decision of the Divisional Court in *Evans v. Newport Urban Sanitary Authority* (1), have contended.

*Appeal dismissed.*

Solicitors for appellants: *Sharpe, Parker & Co., for Kevill, Chorley.*

Solicitor for respondent: *W. Buttle, for Whitfield, Chorley.*

J. F. C.

WILKINSON AND ANOTHER *v.* THE LANCASHIRE AND  
YORKSHIRE RAILWAY COMPANY.

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May 25.

*Railway—Contract of Carriage—Conveyance of Merchandise by Passenger Train—Agreement for Carriage in Absence of Obligation—Agreement not in Writing—Liability for Loss—Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7.*

The defendant company by its time table offered to allow commercial travellers to take with them by passenger train free of charge a certain amount of luggage, which was not ordinary passenger's luggage, "on the condition that the company is relieved from all liability for loss, damage, misdelivery, or delay." The plaintiffs, who were commercial travellers, relying on this offer, but without signing any special contract to that effect, took with them on a journey by the defendant company's line a case of samples, which was lost on the journey by the negligence of the company's servants:—

*Held*, that as no special contract had been signed, the provisions of s. 7 of the Railway and Canal Traffic Act, 1854, applied, and, the condition being thereby made null and void, the company was liable for the loss of the samples.

APPEAL from the Manchester County Court.

The plaintiffs were commercial travellers in the cigar trade,

(1) 24 Q. B. D. 264.

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as was known by the defendants, and were travelling in the ordinary course of their business. They took third class and saloon ordinary return tickets from Huddersfield to Belfast by the defendants' railway and steamer. By a notice in the time table issued by the defendants "Commercial travellers . . . are allowed to take with them, free of charge, the undermentioned quantities of luggage, viz., first class, 3 cwt.; second class, 2 cwt.; third class, 1½ cwt. per passenger, on the condition that the company is relieved from all liability for loss, damage, misdelivery, or delay."

On arriving at Fleetwood the defendant company took charge (inter alia) of a skip which was being used by the plaintiffs jointly for the conveyance of samples, and which was under 1½ cwt. in weight. The skip was admitted to be not ordinary passenger's luggage. The plaintiffs went on to the boat leaving the skip with the defendants' servants to be brought from the railway to the boat. On arriving at Belfast they were informed that the skip had been dropped into the sea by the defendants' servants, and it could not be delivered to the plaintiffs. This action was brought to recover the value of the skip and its contents.

The county court judge gave judgment for the plaintiffs, on the ground that the condition in the defendants' time table was not binding upon them, as no special contract had been signed under s. 7 of the Railway and Canal Traffic Act, 1854. (1)

The railway company appealed.

(1) By the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 7: "Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in any wise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and

void: provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the Court or judge before whom any question relating thereto shall be tried, to be just and reasonable: . . . provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding

*C. A. Russell, K.C. (Spencer Hogg with him)*, for the appellants. Sect. 7 of the Railway and Canal Traffic Act, 1854, does not apply. It only applies to cases where a railway company seeks to limit its liability in regard to the carriage of goods which either by common law or by statute it is bound to carry. Here it was not bound to carry the skip of samples, which was admittedly not passenger's luggage, by passenger train, but it had offered by its time table to do so on condition that it was not liable for any loss or damage. The plaintiffs had accepted that offer, and they cannot now hold the company to their side of the contract and refuse themselves to be bound by the condition. They cannot approbate and reprobate the contract at the same time. At common law a railway company is only bound to carry such goods as it professes to carry, but by statute it is bound to carry certain other things, such as animals, and to offer reasonable facilities for so doing: *Dickson v. Great Northern Ry. Co.* (1) The company is under no obligation to carry these particular goods by passenger train. It is, however, at liberty to do so, and the only way in which the plaintiffs could get it to do so was by entering into the contract which was specified in the time table. This is pointed out by Wills J. in *Stone v. Midland Ry. Co.* (2), a judgment which was expressly approved in the Court of Appeal by Collins M.R. (3) *Cohen v. South Eastern Ry. Co.* (4) does not apply, because this skip of samples was not passenger's luggage, and was only treated by the company as passenger's luggage on the condition set out in the time table that the company should not be responsible for its loss. *Cahill v. London and North Western Ry. Co.* (5) shews that the company are not responsible for the loss of merchandise which has been taken as passenger's luggage.

*Shearman, K.C. (Holman Gregory with him)*, for the respondents. Sect. 7 is a general section in general words, and applies to all goods which the company is under a contract to carry. If the

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upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage . . . ."

- (1) (1886) 18 Q. B. D. 176.
- (2) [1903] 1 K. B. 741, at p. 749.
- (3) [1904] 1 K. B. 669, at p. 676.
- (4) (1877) 2 Ex. D. 253.
- (5) (1863) 13 C. B. (N.S.) 818.

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company contracts to carry merchandise as passenger's luggage it is bound to do so in accordance with the terms of the section. The company carried these samples for reward, for, as is pointed out by Mellish L.J. in *Cohen v. South Eastern Ry. Co.* (1), "You cannot settle the precise sum paid respectively for the carriage of the passenger and for the carriage of the luggage." The decision in *Stone v. Midland Ry. Co.* (2) has no application here. The only question there was whether there was any inequality or unfairness in charging a "collected and delivered" rate for the conveyance by passenger train of goods which the company was not bound to carry in that way. It had offered to carry them at that rate, and the plaintiff claimed a rebate on the ground that, as he had himself collected the goods and delivered them at the railway station, he ought not to have to pay the same rate as those persons from whom the company had collected the goods.

*Spencer Hogg*, replied.

KENNEDY J. In this case I must say I was at first very much impressed by the argument for the appellants. None the less, upon consideration, I think that that argument ought not to succeed now that we have the whole matter before us.

I think that the learned county court judge was right for the reasons that he has given. Mr. Russell's argument depends, to a very large extent, upon the assumption that s. 7 of the Railway and Canal Traffic Act does not apply where the goods in question are not goods which, in respect of the particular conveyance in which they are carried, the company was obliged to carry in that conveyance.

It is obvious that one ought to try to construe the section as it stands, and one must be careful not to read into it limitations which are not in the section, and which need not, in order to give the section its due force, be read into it. I think the basis of the argument for the appellants fails, in spite of the able attempt to make use of the reasoning of Wills J. in the case of *Stone v. Midland Railway Co.* (3), a judgment

(1) 2 Ex. D. 253, at p. 258. (2) [1903] 1 K. B. 741; [1904] 1 K. B. 669  
 (3) [1903] 1 K. B. 741, at pp. 748, 749.

which was quoted by one of the Lords Justices with entire concurrence when that case came before the Court of Appeal. (1) There the question arose as to whether the charge made for carriage of goods from house to house, where the goods were carried by passenger train, could be sustained as against the trader or not, in view of s. 90 of the Railways Clauses Consolidation Act, 1845, which provided substantially that there should be no inequality of charge. It was pointed out in that case that there was in fact no inequality within the section, because the uniform rate offered to all traders if they sent their goods by passenger train (which the company was not obliged to allow them to do) was a house to house rate to all alike.

Now here the subject-matter of the discussion is different, and one has to see if it is sound to say that s. 7 contains a limitation: "This shall not apply to goods which though carried free, . . . received, forwarded, and delivered by the company . . . are goods, received, forwarded, and delivered by means which are not means which the company could be compelled to use." It is clear that this company is not bound to carry these goods at all by passenger train. Is there anything in the statute to shew that if it is not bound to carry them by passenger train, s. 7 has no application when it provides that any special contract shall be binding and affect the party sending the goods only if the contract is signed by him or by the person who delivers the goods for carriage? I think not. I further think that there is really no force in the argument that any decision to the contrary would involve that which the law abhors—i.e., a party taking the advantage of a contract and then reprobating so much of the contract as contains the corresponding limitations or liabilities which the other party, by the contract, intended to impose. In this case if the company, when the plaintiffs tendered their skip of samples to be carried free under the terms offered by the company in its time table, had invited them to sign a contract embodying those terms, and they had refused to do so, I do not see any obligation on the company to carry the samples by passenger train. It had offered by advertisement so to carry

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(1) [1904], 1 K. B. 669, at p. 676.



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them upon certain terms ; and the plaintiffs could only assert a claim on the faith of that advertisement if by signing they put the company in a position to enforce the special contract which, by bringing their goods for this method of conveyance, they shewed themselves ready and indeed anxious to accept. As at present advised I think the company might simply have said : " Very well, we will not take your goods ; they are not passenger's luggage, and we are not bound to convey them by passenger train ; we only offer to do so upon terms which you refuse to make effective." I do not think the difficulty arises. The railway company took these goods without making the special contract in the form in which the statute says it must be made in order to be binding.

For these reasons I think that the appeal must be dismissed.

BRAY J. I am of the same opinion. What we have to consider is whether these goods come within s. 7 of the Railway and Canal Traffic Act. If they come within s. 7, then it is clear that the plaintiffs are entitled to succeed, because the goods were lost by the neglect or default of the railway company. Now, what is necessary in order that they should come within s. 7 ? That section says : " Every . . . company shall be liable for the loss of . . . any articles, goods, or things in the receiving, forwarding, or delivering thereof occasioned by the neglect or default of such company or its servants." It seems to me, therefore, that it is only necessary to shew that the company did receive these goods, and that the loss happened through the neglect of the company's servants. Now, what does " receiving, forwarding, and delivering " mean ? I think it is fair to insert the words " under contract of carriage," and that would deal with the case of *Cahill v. London and North Western Ry. Co.* (1), where practically there was no contract of carriage because the parties were not ad idem. Now was there a contract of carriage here ? The company offered by its time table to take luggage of a certain weight even though it might not be passenger's luggage and might be business luggage. It offered to do that, and it added some terms that in that case

the passenger should not be entitled to recover in the case of any loss. Now, it is equally clear that the plaintiffs accepted that. Then it seems to me there was a contract of carriage. Then what we have to consider is, What is that contract of carriage? The statute has enacted that the condition shall be void. I do not myself see any difficulty about approbation and reprobation. The company know perfectly well that if it does not get its customers to sign such contracts it cannot rely upon them. It knows, further, that unless those contracts are reasonable they cannot be enforced. Therefore it knows its position perfectly well. The customer knows his position and accepts it, but the statute steps in and says "That condition shall be void." But it is said that the section does not apply to these goods because the company was not bound to carry them by passenger train. It is quite true it was not bound to carry them, but what difference does that make? The words of the section are perfectly general, and apply, I think, to all goods. All that is required is that the company shall have received the goods and forwarded them. That condition has been satisfied, and, therefore, it seems to me the case comes within s. 7.

Now we are met with the case of *Stone v. Midland Ry. Co.* (1) As I understand that case it was this: The company had quoted particular terms, a house to house rate for certain non-perishable goods by passenger train. It was not bound to offer a rate for those goods at all. Stone, nevertheless, sent his goods by passenger train and paid the rate and then claimed to have a deduction from that rate because he had performed part of the services himself.

What the Court had to determine there was whether there was anything unequal in that. The answer was: "There is nothing unequal in it; the company is not bound to carry goods by this train at all; it does not offer a station to station rate; it will not agree to take a station to station rate. It offers to all those who like to accept it a house to house rate for the conveyance of such goods, and if a customer prefers, instead of sending goods by the company's collectors' vans, to carry them to the station in his own conveyance, the company will not object."

(1) [1903] 1 K. B. 741; [1904] 1 K. B. 669.

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That is all. There was nothing unequal in that, and that case really does not apply here. Romer L.J. says (1): "So far as concerns carriage of non-perishable goods by passenger train, the company, since the Act of 1891, is clearly under no obligation to carry, and, if they do carry, it appears to me that they may prescribe as to the termini between which they will carry, and the rate at which they will do so. I think, therefore, that the company are entitled to say that they will only carry non-perishable goods by passenger train from house to house, and will not carry them from station to station, and that they are further entitled to say that they will do so at a rate for carriage which will include collection and delivery. Even if it be admitted that there must be equality of charge, the only equality need be that the inclusive rate is not charged differently as between different persons availing themselves of the company's offer." That is the real ground, as it seems to me, of that decision, and it therefore has no application here.

I can see no reason whatever for limiting s. 7, and I must say I was rather startled to find, after a period of fifty years since the Act was passed, that such a contention has been put forward for the first time to-day.

*Appeal dismissed.*

Solicitor for appellants: *A. de C. Parmiter, Manchester.*

Solicitors for respondents: *Upton & Britton, for Wilmshurst & Stones, Huddersfield.*

(1) [1904] 1 K. B. 669, at p. 676.

## [IN THE COURT OF APPEAL.]

THOMAS v. BRADBURY, AGNEW & CO., LIMITED,  
AND ANOTHER.

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1906

June 25.

*Defamation—Libel—Fair Comment—Malice—Privileged Occasion.*

In an action of libel, where the defence is that the writing complained of is fair comment upon a matter of public interest, evidence that the defendant was actuated by malice towards the plaintiff is admissible, upon the ground that comment which is actuated by malice cannot be deemed fair on the part of the person who makes it, and, therefore, proof of malice may take a criticism that is *prima facie* fair outside the limits of fair comment.

*Campbell v. Spottiswoode*, (1863) 3 B. & S. 769; *Henwood v. Harrison*, (1872) L. R. 7 C. P. 606; and *Merivale v. Carson*, (1887) 20 Q. B. D. 275, discussed.

APPLICATION by the defendants for a new trial or that judgment should be entered for them in an action for libel tried before Darling J. with a jury.

The plaintiff, Frederick Moy Thomas, was a journalist, and was the author of a book entitled "Fifty Years of Fleet Street, being the Life and Recollections of Sir John R. Robinson." The defendants, Bradbury, Agnew & Co., were the proprietors and publishers of a journal called *Punch*, and the defendant, Henry W. Lucy, contributed articles to *Punch* under the pseudonym of "Toby, M.P."

Sir John Robinson was a journalist who had been at one time the editor and for many years the manager of the *Daily News* until his retirement in 1901. He died in 1903. The plaintiff had been private secretary to Sir John Robinson. Copies of the above-mentioned book were sent to the Press in the ordinary course, a copy being sent to the defendant Lucy for review.

In the introduction to the book the plaintiff said that "at the death of Sir John Robinson it was announced in several quarters that he had left behind him a volume of memoirs intended for publication. It is unfortunate that this should not be the case, for all who knew him can imagine how delightful



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would have been such a work from his pen. He did, however, leave some diaries, more or less fragmentary, and a number of thick closely-written volumes of jottings in his own handwriting descriptive of events of which he had been an eye-witness and people he had seen and known. From these materials, together with a mass of correspondence with more or less distinguished people of all descriptions, and, I may add, my own recollections extending over nearly a quarter of a century during which I was closely associated with Sir John, the present volume has been compiled. I have not thought it necessary or desirable to indicate in all cases what is his and what is my own. If there is anything amusing or entertaining in these pages, I am quite content that my dear old chief should have the credit of it. The dulness I take upon myself."

The following review of the book was written by the defendant Lucy, and was published in the issue of *Punch* dated November 23, 1904:—

#### "MANGLED REMAINS.

"*Extract from the Recess Diary of Toby, M.P.*

"Been reading 'Fifty Years of Fleet Street' just issued by Macmillan. Purports to be the 'Life and Recollections of Sir John Robinson,' the man who made, and for a quarter of a century maintained at high level, the *Daily News*. The story is written by Mr. F. M. Thomas, who has added a new terror to death. There are biographies of sorts ranging in value with the personality of the subject and the skill of the compiler. The former occasionally suffers from the incapacity of the latter. But at least his individuality is scrupulously observed. Like Don José, what he has said he has said, his observations and written memoranda not being mixed up with what his biographer thinks he himself thought, uttered, and recorded. Mr. Thomas goes about the biographer's business in fresh fashion, complacently announced by way of introduction to the volume. 'I have not thought it necessary or desirable,' he writes, 'to indicate in all cases what is his (Sir John Robinson's) and what is my own. If there is anything amusing or entertaining in these pages, I am quite content that my dear old chief should

have the credit of it. The dulness I take upon myself.' Here be generosity! Here magnanimity! It is true that in the performance of his task Mr. Thomas occasionally falls from this high estate. More than once he airily alludes to 'our diary' and 'our notes,' as if he had prepared them in collaboration with his chief. Possibly conscious for a moment of this indiscretion, and reverting to more generous mood, he, approaching a particular narrative, introduces it with the remark, 'the incident may be given in the diarist's own words.' The procedure is perhaps not unusual with earlier biographers. With Mr. Thomas the lapse is rare. When he does let the hapless subject speak for himself, he is relegated to small type. For the rest, it is Mr. Thomas who *loquitur*, retelling poor Robinson's cherished stories as if they were his own, sometimes with heavy hand brushing off the bloom. Even in these depressing circumstances there is no mistaking Robinson's sly humour, his gift of graphic characterization. The worst of it is that, happening in the very same page upon some banal remark, some pompous platitude, the alarmed reader, recognizing Mr. Thomas, hastily turns over half-a-dozen pages, and possibly misses a handful of the genuine ore. These are hard lines, unjust to Robinson, unfair to the public. It is plain to see, from the few unmutilated extracts from Robinson's manuscript which illuminate the book, that the materials at hand for a delightful biography were abundant. For nearly forty years the manager of the *Daily News* lived in the very heart of things. He was behind most scenes of public life, was more or less intimately acquainted with the principal personages figuring in it. His sympathies were bountifully wide, his observation alert, his sense of humour keen. He loved his newspaper work with almost passionate affection. For him fifty years of Fleet Street were worth a cycle of Cathay. That he habitually made notes of what he saw and heard with the view to publication in biographical form is undoubted. Mr. Thomas, impregnable in the chain armour of complacency, positively admits it. 'Robinson,' he says, 'did leave some diaries—our diaries—more or less fragmentary, and a number of thick, closely-written volumes of jottings in his own handwriting, descriptive of events of which he had been an eye-witness and

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people he had seen and known.' Where is this treasure trove? Presumably portions the biographer was good enough to regard as worth adapting are filtered through the wordy pages of larger type. Happily the material is so good, its original literary form so excellent, that even this unparalleled atrocity cannot quite spoil the book. We who knew Robinson on his throne in Bouverie Street and at the well-known table in the dining-room of the Reform Club, rich in recollections of William Black, Payn, and Sala; who watched him enjoying himself like a boy at theatre first nights; who recognized his rare capacity as a newspaper man; who knew the kind heart hidden behind a studiously cultured severity of manner in business relations—we, perhaps jealously, cherish his memory, and regret the surprising chance that has made possible this slight upon it."

In a letter to the editor of *Punch* the plaintiff described the statement in the above review that "the materials at hand for a delightful biography were abundant" as "simply untrue"; and in the issue of *Punch* of December 7, 1904, a statement was published which, after quoting the passage from the introduction to the book as to the materials which Sir John Robinson left behind and accepting the plaintiff's account as to the paucity of materials, concludes thus: "Toby, M.P., had at the time of writing no knowledge of the subject beyond the definite statements quoted in the biographer's own words. He regrets that, accepting them in their ordinary sense, he received, and conveyed, an impression of Mr. Thomas's literary methods which turns out to have been erroneous."

The plaintiff thereupon brought this action claiming damages for libel in respect of the review set out above.

The innuendoes alleged in the statement of claim were very numerous, suggesting, among other things, that the words meant that the plaintiff had wilfully and out of conceit mixed up memoranda and notes left by Sir John Robinson, in an unjustifiable manner, with inferior matter of his own, in order to get for himself the credit for another man's literary merit; that the plaintiff pretended that he was the part author of and partly entitled to the credit for work which he knew to be that of Sir John Robinson, and dishonestly put forward as if it were his

own; that the plaintiff passed off as his own, with the view of deceiving the public, stories which were generally regarded as being the peculiar property of Sir John Robinson, and by telling them clumsily spoilt them; and that the plaintiff had at his command abundant materials for a delightful biography, and was an incompetent and unskilful writer, and that through incompetence and conceit he had suppressed much valuable and interesting literary matter left by Sir John Robinson, and had picked out the best parts of such literary matter and put them into larger type than the passages of acknowledged quotation in order to deceive the public into the belief that such matter was the plaintiff's original writing.

The defence admitted that the defendant Lucy wrote, and that the other defendants published, the words complained of, and pleaded that the words were incapable of a defamatory meaning; and further, that they were written for publication and were published as a criticism and fair comment upon the plaintiff's book without any malice towards the plaintiff, and were a fair and bona fide criticism and comment upon the book which was a matter of public interest.

At the trial the plaintiff's case was, first, that the language of the review itself was such as to furnish evidence that the writer was not in truth criticizing the book, but was maliciously attacking the author; and, secondly, that there was evidence outside the review that the defendant Lucy, in writing the criticism, was actuated by malice towards the plaintiff. As extrinsic evidence of malice the plaintiff relied upon the strained relations between Lucy and himself before the criticism was published; on the fact that the criticism was published as a separate article under the heading "Mangled Remains," and was not included in that part of the journal usually devoted to reviews of books under the heading "Our Booking Office"; and on the answers and demeanour of Lucy in the witness-box at the trial. At the close of the plaintiff's case counsel for the defendants submitted that there was no case to go to the jury, upon the grounds that the article was incapable of a defamatory meaning, and that there was no evidence that it exceeded the limits of fair comment.

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C. A.        The learned judge declined to withdraw the case from the jury,  
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The defendants appealed.

June 14. *Scrutton, K.C.*, and *J. R. Atkin*, for the defendants. Though the review of the plaintiff's book is a severe criticism upon the way in which it was written and a strong expression of opinion unfavourable to the book, it is bona fide and honest criticism upon a matter of public interest, and is therefore fair comment. If the criticism is honest and relevant, it is fair comment: *McQuire v. Western Morning News Co.* (1) An exaggerated and even violent criticism may be fair comment. It is not for the jury to apply the standard of their own taste and to measure the rights of the critic accordingly. A writer exceeds the limits of fair comment if in criticizing he misstates some fact and bases his criticism upon that, as was the case of *Merivale v. Carson* (2); or if he goes outside the work and attacks the personal character of the author, or uses the occasion, not for the purpose of honest criticism, but as a cloak for mere invective with the object of injuring the author. There is no evidence to bring the case within any of those categories. There is no misstatement of fact in the review. There is no attack on the plaintiff's personal character. It is impossible to criticize a book without at the same time criticizing the writer. To say that a book is a badly-written book is to suggest that the writer of it is an unskilful author. But that is not what is meant by an attack on the personal character of the writer. No reasonable jury could find that this review was not an honest criticism of the plaintiff's book. The criticism on its face does not exceed the limits of fair comment, and, even if evidence of actual malice on the part of the defendant Lucy is relevant, there is no such evidence here. The suggested evidence of malice comes to nothing. But further, if the criticism itself does not on its face exceed the limits of fair comment, then proof of malice in the writer does not destroy his immunity. Suppose there are two criticisms of a book by different writers, both couched in similar terms, and each being on its face fair comment, it

(1) [1903] 2 K. B. 100.

(2) (1887) 20 Q. B. D. 275.

cannot be said that one exceeds the limits of fair comment because the writer of it is actuated by a malicious feeling towards the author of the book, whereas the other does not exceed the limits of fair comment because the writer of it is not actuated by malice. In neither case is the writer liable. It is analogous to the case of two writers publishing a true defamatory statement of another person, one being actuated by malice, and the other not. There is no liability in either case.

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The malice of the writer, unless it appears on the face of the criticism, is irrelevant to the question of fair comment. The defence of fair comment is not a defence that the occasion is privileged, which can be rebutted by shewing actual malice in the writer. Fair comment is no libel: per Crompton J. and Blackburn J. in *Campbell v. Spottiswoode*. (1) It was necessary in that case to say whether the defence of fair comment was a branch of the law of privilege, because the jury found that the writer of the article believed the imputations in it to be well founded, and therefore that belief would be a defence if the occasion was privileged. Those judgments were approved by the Court of Appeal in *Merivale v. Carson* (2), where Lord Esher M.R. and Bowen L.J. held that in fair comment the question is, not whether the article is privileged, but whether it exceeds the limits of fair comment, and if those limits are not passed there is no libel. The Court refused to follow the dictum to the contrary effect of Willes J. when delivering the judgment of the majority of the Court of Common Pleas in *Henwood v. Harrison*. (3) For these reasons the learned judge ought to have withdrawn the case from the jury, and judgment should now be entered for the defendants.

*Dickens, K.C.*, and *E. F. Spence*, for the plaintiff. There was evidence, both upon the face of the article and also outside the article, upon which the jury could properly find that the criticism of the plaintiff's book was not fair comment. The article on its face shews that the writer of it was not honestly and bona fide criticizing the book, but was using the occasion for the purpose of attacking the plaintiff personally. The

(1) (1863) 3 B. & S. 769, at pp. 778, 780. (2) 20 Q. B. D. 275.

(3) (1872) L. R. 7 C. P. 606, at p. 625

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whole tone of the article is evidence of that. Further, there was a misstatement of fact in the article in stating that "the materials at hand for a delightful biography were abundant." That was not true, and the writer ought to have known it, because it was stated in the introduction to the book that Sir John Robinson left some diaries, more or less fragmentary, and a number of thick, closely-written jottings in his own handwriting. The defendants in the issue of *Punch* of December 7 practically admitted the misstatement. That brings the case within the decision in *Merivale v. Carson*. (1) There was also the special position assigned to the article in *Punch*, coupled with the heading "Mangled Remains," from which the jury might properly infer that the writer was actuated by spite against the plaintiff. The demeanour of the defendant Lucy in the witness-box and some of the answers which he gave were also evidence of malice. In *McQuire v. Western Morning News Co.* (2) there was no attack upon the plaintiff either as the author of the play or as an actor, and it was admitted that there was no evidence of any malice or indirect motive on the part of the writer of the criticism towards the plaintiff. There was only strong comment on the play and on the plaintiff's acting. Here there was an attack on the plaintiff in his personal character and in his character as an author generally. It is not permissible to attack the character of an author as an author generally apart from the book, the subject-matter of the criticism: *Joynt v. Cycle Trade Publishing Co.* (3) The regret expressed in the article at the surprising chance that had made possible the slight upon the memory of Sir John Robinson could only refer to the fact that the plaintiff had been chosen to write the book. That was undoubtedly an attack upon the plaintiff as an incompetent author quite apart from the merits of the particular book. Even assuming that the article could upon its face be described as fair comment, if the writer was actuated by malice towards the plaintiff it ceased to be fair comment. A man whose writing is actuated by malice cannot be called a critic in the fair sense of the term. The review, being saturated with malice, cannot be

(1) 20 Q. B. D. 275.

(2) [1903] 2 K. B. 100.

(3) [1904] 2 K. B. 292, at p. 297.

called a criticism. The defence of fair comment is, when properly understood, a defence that the words complained of were published on a privileged occasion. The law as to fair comment is a branch of the law of privilege, and malice destroys the immunity. That was the opinion of the Court of Queen's Bench as delivered by Cockburn C.J. in *Wason v. Walter* (1), and that view was adopted by Willes J. in delivering the judgment of the majority of the Court of Common Pleas in *Henwood v. Harrison*. (2) That view rests upon principle, and is to be preferred to the view of Crompton J. and Blackburn J. in *Campbell v. Spottiswoode*. (3) In *Merivale v. Carson* (4) there was a misstatement of fact in the review complained of, and that was made the foundation of the criticism. That could not come within the defence of fair comment, and therefore the remarks of Lord Esher M.R. and Bowen L.J., to the effect that fair comment is protected, not because it is published on a privileged occasion, but because it is no libel, were merely dicta. Moreover, Lord Esher seemed to think (5) that an intention to injure the plaintiff would prevent the criticism being fair criticism, because the comment would not then be a criticism of the work; and Bowen L.J. says (6) that the question is rather academical than practical. The occasion of the publication being privileged, evidence of malice was admissible to destroy the privilege, and, there being such evidence, the case was one proper for the consideration of the jury.

*Scrutton, K.C.*, in reply. In *Henwood v. Harrison* (7) it was admitted that the defendant acted without malice, and so it was not necessary to decide whether the defence of fair comment depended upon the occasion being privileged or upon the criticism being no libel. The term privilege is always used with reference to a case in which a certain person has, or a certain class of persons have, a special duty apart from the rest of the public. That cannot apply to the case of a criticism of a literary work which everyone has a right to publish. Lord Esher's remark in *Merivale v. Carson* (5), which is relied upon by the

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(1) (1868) L. R. 4 Q. B. 73, at p. 96.

(4) 20 Q. B. D. 275.

(2) L. R. 7 C. P. 606, at p. 625.

(5) 20 Q. B. D. 275, at p. 281.

(3) 3 B. &amp; S. 769, at pp. 778, 780.

(6) 20 Q. B. D. 275, at p. 283.

(7) L. R. 7 C. P. 606.



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plaintiff, only goes to this, that there may be a criticism so vindictive as to shew that the critic is not really criticizing the work at all, but is making an attack on the author. There may be such cases. But when the work is reviewed, the motive of the reviewer is immaterial. The author of the work may be criticized as an author apart from the particular work. The dictum of Vaughan Williams L.J. in *Joynt v. Cycle Trade Publishing Co.*(1)—that if the critic makes suggestions and reflections disparaging the character of the author, even as an author, he cannot rely upon the defence of fair comment—goes too far, and is not warranted by any authority. It is almost impossible in criticizing a book not to criticize the author as an author. In *McQuire v. Western Morning News Co.*(2) there was a criticism upon the plaintiff as an author. The true rule is laid down in *Carr v. Hood* (3) and *Macleod v. Wakley*. (4)

*Cur. adv. vult.*

June 25. COLLINS M.R. read the following judgment:—This is an appeal by the defendants from the verdict and judgment for the plaintiff in an action of libel, tried before Darling J. and a special jury, based on a critique of a book written by the plaintiff. The critique was written by the defendant Lucy, and appeared in *Punch*, of which the first defendants are the publishers. The defence was fair comment. The learned judge refused to withdraw the case from the jury, who found for the plaintiff, with 300*l.* damages. The defendants do not complain of misdirection other than that involved in holding that there was any evidence fit for the consideration of a jury. They ask for judgment on the ground that there was nothing in the article which any reasonable jury could find to fall outside the limits of fair comment, or in the alternative they ask for a new trial on the ground that the verdict was against the weight of evidence.

The defendants pressed us strongly with the case of *McQuire v. Western Morning News Co.* (2), a decision of this Court in an

(1) [1904] 2 K. B. 292, at p. 297.

(2) [1903] 2 K. B. 100.

(3) (1808) 1 Camp. 354, n.

(4) (1828) 3 C. & P. 311.

action for libel in respect of an article criticizing adversely a play of which the plaintiff was the author, where the Court set aside a verdict and judgment for the plaintiff on the ground that there was no evidence on which a rational verdict for the plaintiff could be founded. There were, however, two distinctions between that case and the present. There was admittedly in that case no evidence of actual malice unless it could be inferred from the terms of the article itself, and there was some reason for supposing that the direction was misleading. In the present case the plaintiff's counsel strenuously contended that there was extrinsic evidence of malice in the proved relations of the parties before the action; the special manner in which the particular article appeared in *Punch*; and in the expressions which fell from the defendant Lucy, coupled with his demeanour in the witness-box, and they relied also on the terms of an apology subsequently printed as fortifying their contention. They urged besides that the language of the article itself raised a question for the jury as to its meaning, and that upon their view of its meaning would depend the question whether it exceeded the bounds of fair comment or not. The question, therefore, for our decision is whether there was any evidence upon which a rational verdict for the plaintiff could be founded. If so, the learned judge was bound to leave it to the jury. I have already said that extrinsic evidence of malice, which I have attempted to summarize, was allowed to go to the jury. The defendants contended that this evidence amounted to nothing, and that no reasonable jury could act upon it, but they also raised a contention which alone, as it seems to me, gives any importance to this case. Their point was that if the article itself, apart from the extrinsic evidence, did not raise a case for the jury that the bounds of fair comment had been overstepped, proof of actual malice on the part of the writer could not affect the question or disturb his immunity. This is a formidable contention. It involves the assertion that fair comment is absolute, not relative, and must be measured by an abstract standard; that it is a thing quite apart from the opinions and motives of its author and his personal relations towards the writer of the thing criticized. It involves the position also that an action based on a

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criticism is wholly outside the ordinary law of libel, of which malice, express or implied, has always been considered to be the gist.

The basis of this contention, such as it is, appears to be a misconception of the effect of the gloss, if I may so phrase it, first put upon the law of libel in relation to fair comment in the dicta of Crompton J. and Blackburn J. in *Campbell v. Spottiswoode* (1), decided in 1863, and subsequently approved in *Merivale v. Carson* (2), decided in 1887. I have already had occasion to examine the effect of these views upon the law of libel in *McQuire v. Western Morning News Co.* (3) In my opinion the substance of the matter remains unchanged and malice remains exactly where it did. The dicta no doubt assert the etymological inexactitude of the word "privilege" as connoting a right common to the public at large, and the limits of the right itself are pointed out which, whether it be called privilege or by any other name, does not extend to cover misstatements of fact however bona fide; but they in no degree affect the standard by which the fairness of the comment is to be judged or relieve the commentator from liability, if the comment be malicious, if, indeed, it can then be described as comment at all. The right, though shared by the public, is the right of every individual who asserts it, and is, qua him, an individual right whatever name it be called by, and comment by him which is coloured by malice cannot from his standpoint be deemed fair. He, and he only, is the person in whose motives the plaintiff in the libel action is concerned, and if he, the person sued, is proved to have allowed his view to be distorted by malice, it is quite immaterial that somebody else might without malice have written an equally damnatory criticism. The defendant, and not that other person, is the party sued. This seems to me quite clear in point of principle; but, as already pointed out in *McQuire v. Western Morning News Co.* (3), the law continued to be administered after *Campbell v. Spottiswoode* (4) just as it always had been before, down to and since *Merivale v. Carson*. (2) That case decided nothing inconsistent

(1) 3 B. &amp; S. 769, at pp. 778, 780.

(3) [1903] 2 K. B. 100.

(2) 20 Q. B. D. 275.

(4) 3 B. &amp; S. 769.

with the law of libel as thus administered, though each of the learned judges expressed an opinion in favour of the view taken in the dicta I have referred to of Crompton J. and Blackburn J. in preference to that of Willes J. in *Henwood v. Harrison*. (1) But, as already pointed out in *McQuire v. Western Morning News Co.* (2), the difference between the two views is, in the language of Bowen L.J. in *Merivale v. Carson* (3), a difference in the "metaphysical exposition" of the right and "is rather academical than practical." I think the head-note in the last-mentioned case is to some extent the cause of what seems to me an erroneous impression as to the effect of the decision. The words of that note seem to suggest a difference of right, under the general law of libel, in respect of communications made on a privileged occasion and communications made in the shape of criticism on a matter of public interest. In cases of privilege, properly so called, nothing that falls outside the privilege is protected by it, and if defamatory it must be otherwise justified. The occasion being privileged, the extent of the privilege may vary according to the nature of the case and the limits of the right or duty which is the basis of the privilege. But this is precisely the position in the case where the right exercised is one shared by the rest of the public, and not one limited to an individual or a class. The extent of the right has to be ascertained, and in respect of any communication which falls within it the immunity, if it be not absolute, can be displaced only by proof of malice. In the case of comment on literary works the occasion is created by the publication, and a right then arises to criticize honestly, however adversely. No such occasion would arise in respect of a private unpublished letter. If a writer were to get hold of a private letter of a well-known author and publish a damnatory article on the author's literary style and taste, as evidenced by the letter, it seems to me that he would have no immunity from the ordinary law in respect of defamatory writings. The only difference, then, in the legal incidents of ordinary privilege, limited to individuals on the one hand and the right in the public to criticize on the other, would

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(1) L. R. 7 C. P. 606.

(2) [1903] 2 K. B. 100.

(3) 20 Q. B. D. 275, at pp. 282, 283.



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seem to be that the one might, with somewhat less latitude than the other, though not, perhaps, with perfect accuracy, be described as "privilege." Now, the head-note might possibly suggest, at first sight at all events, particularly when it adds "*Henwood v. Harrison* (1) dissented from," that not merely an academical difference in the analysis of rights had been expressed, but that there was a difference of substance in the bearing of malice in the two cases in respect of communications or criticisms falling *prima facie* within the right or privilege. The limits of the right, as I have already pointed out, may be, and are, different, but the law with respect to communications that *prima facie* fall within them is the same. Proof of malice may take a criticism *prima facie* fair outside the right of fair comment, just as it takes a communication *prima facie* privileged outside the privilege. The particular allegation which was unprotected in *Merivale v. Carson* (2) was never within the "right" when the facts were ascertained by the jury in interpreting the passage impugned. Proof of bona fide belief was therefore irrelevant; nothing but proof of the truth could justify the allegation. If the analysis be strictly carried out it will be found that the two rights, whatever name they are called by, are governed by precisely the same rules. The only practical difference is that in an action based on a criticism of a published work the transaction begins by the admission, on the part of the plaintiff, implied from the averment by him of publication of the work criticized, that the comment came into existence on a protected occasion. He is placed, therefore, in precisely the same position as he would have been in had he sued in respect of a defamatory writing *prima facie* unprotected and therefore actionable, but had gone on to aver facts which created a privilege strictly so called. Beginning thus at this stage in the transaction, he would have accepted the onus of proving malice in fact. If he had veiled the fact that the writing criticized had become matter of public interest by publication it would have been *prima facie* libellous, and the defendant would have had to plead such a publication as would let in the right to comment on a matter of public interest

(1) L. R. 7 C. P. 606.

(2) 20 Q. B. D. 275.

in order to bring himself within the protection. This shews that acceptance of the dicta under discussion does not in the slightest degree affect the place of malice in the law of libel, and that it is only by leaving out one step in the analysis that the public right, as distinguished from the privilege, may appear to carry with it different incidents. There is not even any decision that the word privilege, as used in *Henwood v. Harrison* (1), to which Lord Esher was himself a party, is not as good a word as any substitute that can be suggested to express the right by which, in certain circumstances, writings defamatory of another person may be published with impunity, because the presumption of malice is negatived. For the reasons I have given the difference is one of words only, and could not be a matter of legal decision.

I have thought it worth while to sift this contention somewhat elaborately, as it is apparently based upon a misconception which seems to have a tendency to repeat itself as to the effect of *Merivale v. Carson* (2) on the law of libel. But the contention of the defendants can be met, not by reference to principle only, but also by direct authority. To go back to the source itself of the supposed new departure, *Campbell v. Spottiswoode* (3), Blackburn J. says: "Honest belief may be an ingredient to be taken into consideration by the jury in determining whether the publication is a libel, that is, whether it exceeds the limits of a fair and proper comment." In *Merivale v. Carson* (4) itself Lord Esher M.R. deals with the question. He says: "It is said that if in some other case the alleged libel would not be beyond the limits of fair criticism, and it could be shewn that the defendant was not really criticizing the work, but was writing with an indirect and dishonest intention to injure the plaintiffs, still the motive would not make the criticism a libel. I am inclined to think that it would, and for this reason, that the comment would not then really be a criticism of the work. The mind of the writer would not be that of a critic, but he would be actuated by an intention to injure the author." Though the learned judge in this passage expresses only an inclination

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(1) L. R. 7 C. P. 606.

(2) 20 Q. B. D. 275.

(3) 3 B. &amp; S. 769, at p. 781.

(4) 20 Q. B. D. 275, at p. 281.

C. A. of opinion, the reason given seems to me to be conclusive. But  
1906 in a very recent case in this Court, the point is actually decided :

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*Plymouth Mutual Co-operative and Industrial Society v. Traders' Publishing Association.*(1) The question there was whether an interrogatory addressed to the state of mind of the defendant, who had pleaded fair comment in an action of libel, was admissible. The Court decided that it was, following a previous decision of this Court in a case of privilege strictly so called. Vaughan Williams L.J., referring to *White & Co. v. Credit Reform Association and Credit Index* (2), says at page 413 of the report: "It seems to me that that case shews that an interrogatory of this kind is just as relevant and admissible in a case where the defence is fair comment as in one where it is privilege. In either case the question raised is really as to the state of mind of the defendant when he published the alleged libel, the question being in the one case whether he published it in the spirit of malice, in the other whether he published it in the spirit of unfairness. In either case, I think such an interrogatory as the one now in question is admissible." Fletcher Moulton L.J. says at page 418 of the report: "I am clear that, both in cases in which the defence of privilege and in those in which the defence of fair comment is set up, the state of mind of the defendant when he published the alleged libel is a matter directly in issue."

It is, of course, possible for a person to have a spite against another and yet to bring a perfectly dispassionate judgment to bear upon his literary merits ; but, given the existence of malice, it must be for the jury to say whether it has warped his judgment. Comment distorted by malice cannot in my opinion be fair on the part of the person who makes it. I am of opinion, therefore, that evidence of malice actuating the defendant was admissible, and that the learned judge was right in letting the evidence in this case go to the jury. But I am also of opinion on a close examination of the alleged libel that, apart from the extrinsic evidence of malice, the learned judge could not have withdrawn the case from the jury. One point made by the plaintiff would, I think, of itself suffice to establish this position.

(1) [1906] 1 K. B. 403.

(2) [1905] 1 K. B. 653.

The defendant Lucy says in the alleged libel "it is plain to see from the few unmutilated extracts . . . that the materials at hand for a delightful biography were abundant." This statement was described by the plaintiff in a letter to the editor of *Punch* as "simply untrue." A short statement was thereupon published in the issue of December 7, in which the defendant, while accepting the plaintiff's statement as to the paucity of materials, quotes a passage from the preface to the book dealing with the existence of materials, and concludes thus: "Toby, M.P., had at the time of writing no knowledge of the subject beyond the definite statements quoted in the biographer's own words. He regrets that, accepting them in their ordinary sense, he received and conveyed an impression of Mr. Thomas's literary methods which turns out to have been erroneous." He is thus in the difficulty of having to admit a misstatement of fact in respect of which, to put it at the lowest, a question must arise for the jury whether the passage he relied upon justifies the statement. I think also that the learned judge could not have properly held that there was no evidence fit for the consideration of the jury as to some of the innuendoes averring imputations of discreditable motives. I am of opinion, therefore, that we could not direct judgment for the defendants without usurping the functions of the jury. Neither can we say that the evidence is so slight as to justify us in ordering a new trial on the ground that the verdict is against the weight of the evidence.

A point was made by the defendants' counsel that the plaintiff had admitted that he did not rely upon evidence of malice outside that which was to be inferred from the article itself. Something to this effect certainly appears in the *Times* report, but it has not found its way into the judge's note, and the point of personal spite was forcibly put by the plaintiff's counsel throughout the whole case, which the judge refused to withdraw from the jury without any limitation as to any of the evidence given. I think, therefore, that we should not be justified in treating this answer as excluding all extrinsic evidence of malice from the discussion. Libel or no libel, I need hardly add, is pre-eminently a question for the jury where there is any evidence fit for their consideration.

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C. A. COZENS-HARDY L.J. I agree.

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SIR GORELL BARNES, PRESIDENT. I have had an opportunity of reading the judgment of the Master of the Rolls, and I agree with it.

*Appeal dismissed.*

Solicitors for plaintiff: *Smiles & Co.*

Solicitors for defendants: *Lee & Pembertons.*

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May 22 ;  
June 25 ;  
July 9.

*In re* PILLING.

*Ex parte* SALAMAN.

*Bankruptcy—Practice—Trustee's Power to Compromise Claims—Sanction of Committee of Inspection—Opposition by Bankrupt—Application to Court for Directions—The Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), s. 57, sub-s. 6; s. 89, sub-s. 3.*

A trustee in bankruptcy having, under sub-s. 6 of s. 57 of the Bankruptcy Act, 1883, ample power with the sanction of the committee of inspection to compromise all claims, the Court will not, as a general rule, on an application by the trustee under s. 89, sub-s. 3, of the Act for directions, express any opinion upon a proposed compromise, however complicated the matter may be, nor interfere in any way.

Where the trustee and committee of inspection propose to accept a compromise, it is for the party objecting to satisfy the Court that the compromise is one which ought not to be entertained.

This was a motion by the trustee for leave to compromise certain claims which the bankrupt had against certain companies under these circumstances.

In 1890 the bankrupt and one Elias obtained a concession from the Turkish Government for the construction and working of the Akka-Damascus Railway and its branches, the bankrupt and Elias undertaking to form an Ottoman limited liability company within nine months of the date of the firman by which the concession was granted for the purpose of constructing the railway; and in pursuance of the concession the bankrupt formed according to Turkish law the Syria Ottoman Railway Company, hereafter called "the Turkish company." Various companies

were formed by the debtor for the purpose of financing the Turkish company, and amongst them were two English companies, one called the Syria Ottoman Railway Company (hereafter called "the English company"), and the other the Bank of Syria, Limited. All these subsidiary companies were eventually ordered to be wound up and the official receiver was the liquidator of them.

By an agreement dated June 7, 1894, the Turkish company for the consideration therein mentioned agreed to pay the debtor the sum of 70,000*l.* in cash within a certain time, and until such payment the said sum was charged upon the undertaking of the Turkish company, including the said concession. By another agreement, dated August 31, 1898, the debtor, in consideration of a Mr. Hills agreeing to finance the Turkish company, agreed to accept from that company, and that company agreed to issue to the debtor, in satisfaction of the said sum of 70,000*l.* cash and of certain other claims that he had against the company, 2750 fully paid-up shares of the company. After the execution of the agreement of June 7, 1894, the debtor charged his interest in the concession and in the said sum of 70,000*l.* to various persons by way of security for loans made to him.

On September 7, 1898, a receiving order was made against the debtor on a creditor's petition. He carried in several schemes for the payment of a composition which failed to be sanctioned by the Court, and ultimately on January 27, 1904, he was adjudicated bankrupt, and Mr. Salaman became the trustee with a committee of inspection.

In the meantime, on July 20, 1900, an action was commenced in the Chancery Division of the High Court by two of the debtor's mortgagees against the Turkish company, the debtor, and the various other persons claiming to have charges on the 70,000*l.*, in which the plaintiffs sought to enforce their security and claimed priority over all the defendants. In February, 1904, the Turkish company was ordered to be wound up compulsorily, and the official receiver became the liquidator; and he subsequently retroceded to the Ottoman Government the said concession for the sum of 155,000*l.*, and the greater part of this sum was now in Court.

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The charges on the bankrupt's interest under the agreement of June 7, 1894, amounted to 64,522*l.* and interest, and negotiations for a compromise ensued between the trustee, the liquidator, and the numerous parties claiming to have charges on the bankrupt's interest, and eventually the liquidator of the Turkish company offered to pay the trustee in bankruptcy 8500*l.* in settlement of any interest which the bankrupt might have under the agreement of June 7, 1894, and the bankrupt's claims against the above-mentioned companies, and to satisfy all the various persons who claimed to have charges on the bankrupt's interest under that agreement, and also to pay the trustee's costs of the Chancery action.

The trustee and committee of inspection approved of the proposed compromise, and proposed to accept the offer, but the bankrupt strenuously opposed the compromise, alleging that if his estate was properly administered it would realize more than enough to pay all his creditors in full, and he wrote to the trustee stating that he would hold him personally responsible if the offer were accepted, and threatened him with legal proceedings. Thereupon the trustee applied to the Court under s. 89 of the Act that he might be at liberty to accept the offer. The application came before the registrar, who referred it to the judge, and it now came on for hearing.

*Clayton*, for the trustee. No dividend has been declared. The trustee's costs have been very heavy, and in any case there will be no surplus for the bankrupt. The trustee considers the offer a valuable compromise, and, if it is sanctioned, there will be after payment of costs a small dividend for the unsecured creditors.

[BIGHAM J. The Act of Parliament empowers the trustee to accept the offer. Why should he, because he feels nervous, ask the Court to decide the matter for him? Has the bankrupt any *locus standi* to object?]

If the bankrupt could make out a case for the interference of the Court he could object. Here he threatens legal proceedings, and the trustee is entitled to the protection of the Court. It is submitted that the application is analogous to an application by

a trustee in the Chancery Division to the Court for directions. If the Court approves, the matter is *res judicata* and the trustee is protected.

[BIGHAM J. The trustee is not a trustee for the bankrupt. I am not at all disposed to express any opinion on this matter. Whether the compromise ought or ought not to be made is entirely for the trustee and committee of inspection to decide. They must exercise their judgment and act upon it. I think that on an application of this kind it is for the bankrupt to satisfy the Court that the compromise ought not to be made.]

*Montague Lush, K.C.*, and *Carrington*, for the bankrupt. There is over 130,000*l.* in Court, and, if the bankrupt has not parted with his right to be paid his 70,000*l.* and other claims in cash, those claims must be paid out of the money in Court, and there is a possibility of a surplus for him unless the money is swallowed up by the claims of his creditors and the costs of the bankruptcy. He has sworn that he never agreed to exchange his right to cash for paid-up shares, and there are no proper materials before the Court to enable it to express an opinion on the proposed compromise. The claims originally lodged against the bankrupt's estate amounted to 102,000*l.*, and he has succeeded in reducing them to 22,000*l.* If the compromise is accepted, the bankrupt's prospects of a surplus will be entirely extinguished.

BIGHAM J. This matter comes before me under sub-s. 3 of s. 89 of the Bankruptcy Act of 1883. That sub-section provides that the trustee may apply to the Court for directions in reference to any particular matter arising under the bankruptcy. There is, as I understand the section, no obligation on the Court to give directions, and in this case I do not propose to give any. The application is by the trustee for the sanction of the Court to enter into a compromise of certain claims which the bankrupt is supposed to have against a number of different corporations and persons. The circumstances which are put forward in support of the compromise are extremely complicated and difficult to understand. They present considerations of a kind which, in my opinion, the trustee ought himself to deal with, with the assistance of the committee of inspection, and it is not right that

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he should apply to the Court to relieve him from the obligation which the Act of Parliament puts upon him. He is a man of business, and he must consider for himself whether the compromise is reasonable or not. The committee of inspection have a right to be consulted in the matter. They must form their opinion about it. I am not going to say a word either in favour of this compromise or against it, but, as the application was rendered necessary by the conduct of the bankrupt himself, the trustee may take his costs of it out of the estate. I make no order as to the bankrupt's costs.

Solicitors: *A. J. Benjamin ; W. S. Fiske.*

H. L. F.

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[IN THE COURT OF APPEAL.]

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 July 10, 11.

CLARK *v.* LONDON GENERAL OMNIBUS COMPANY,  
 LIMITED.

*Master and Servant—Cause of Action—Negligence causing Death—"Actio personalis moritur cum persona"—Parent and Child—Recovery of Burial Expenses—Fatal Accidents Act, 1846 (9 & 10 Vict. c. 93).*

A master cannot maintain an action for injuries which cause the immediate death of his servant.

A father cannot recover, either at common law or under the Fatal Accidents Act, 1846 (Lord Campbell's Act), the funeral expenses to which he has been put in burying an unmarried infant daughter whose death was caused by reason of the defendants' negligence and who was residing with her father at the time of her death.

*Osborn v. Gillett*, (1873) L. R. 8 Ex. 88, approved.

APPEAL by the defendants from the judgment of Darling J. at the trial of the action with a common jury.

The action was brought by the plaintiff under the Fatal Accidents Act, 1846 (Lord Campbell's Act), and at common law, to recover damages for loss sustained by him owing to the death of his daughter (aged twelve) in consequence of the alleged negligence of the defendants' servants in driving an omnibus, and also for damage done to two bicycles.

It appeared at the trial that the deceased girl lived with her

parents and had been in the habit of assisting her mother in the house, and that since her death additional assistance in the way of a permanent servant living in the house had been rendered necessary. On the morning of May 18, 1904, about seven o'clock, the plaintiff was cycling with his daughter along the New King's Road, Fulham, on their return home, when the daughter came into collision with an omnibus which was coming out of one of the defendants' yards. The daughter received injuries which resulted in her almost immediate death. Both bicycles were also badly damaged.

The plaintiff brought the action as father of the deceased, on behalf of himself as the person entitled, and in his personal capacity. At the time of her death her schooling was costing nothing.

The plaintiff claimed—(a) the funeral expenses to which he had been put; (b) the travelling expenses incurred to recruit the health of himself and his wife, they having become ill by reason of the shock occasioned by their daughter's death; (c) the amount of the damage done to the bicycles; and (d) the loss sustained by the plaintiff owing to the loss of the services of his daughter.

The jury found, in answer to questions left to them by Darling J.—(a) that the defendants were guilty of negligence which caused the death of the plaintiff's daughter; (b) that the plaintiff had suffered no damage by reason of any loss of his daughter's service; (c) that the plaintiff and his wife became ill in consequence of the death of their daughter; (d) that the damages in consequence of such illness were 20*l.*; (e) that the amount of the funeral expenses was 14*l.*, and the damage to the bicycles 6*l.*

Darling J. gave judgment for the plaintiff for 20*l.*, being 14*l.* for the funeral expenses and 6*l.* for the damage to the bicycles. He held that the plaintiff was not entitled to recover the 20*l.* awarded as damages in consequence of the plaintiff's illness and that of his wife.

The defendants appealed from so much of the judgment as directed that judgment be entered for the plaintiff for 14*l.*, the amount of the funeral expenses.

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*Roskill, K.C., and Horace Marshall*, for the defendants. The judge was wrong in holding that the funeral expenses were recoverable. They are not recoverable either at common law or under Lord Campbell's Act. (1) The law was summarized by Lord Ellenborough in *Baker v. Bolton* (2), where he said that "in a civil Court the death of a human being could not be complained of as an injury." In *Higgins v. Butcher* (3) it was held that a husband could not recover for injuries done to his wife which caused her death. These are the only two authorities prior to Lord Campbell's Act. This lack of authority points to the fact that the law was considered to be absolutely clear, that there was no remedy for the death of a human being. This view is supported by the preamble to Lord Campbell's Act, which recites that "no action at law is now maintainable against a person who, by his wrongful act, neglect, or default, may have caused the death of another person." In *Duncan v. Findlater* (4) Sir J. Campbell, A.-G., in his argument said: "By the English law, if a man's wife or son

(1) Fatal Accidents Act, 1846 (Lord Campbell's Act): "'Whereas no action at law is now maintainable against a person who by his wrongful act, neglect, or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him:' Be it therefore enacted . . . that whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circum-

stances as amount in law to felony."

Sect. 2: "And be it enacted, that every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought; and the amount so recovered, after deducting the costs not recovered from the defendant, shall be divided amongst the before-mentioned parties in such shares as the jury by their verdict shall find and direct."

(2) (1808) 1 Camp. 493.

(3) (1606) Yelv. 89.

(4) (1839) 6 Cl. & F. 894.

should be killed on the spot, he could have no action against the person whose negligence had caused the death." This appears to have been approved by the House of Lords. The decision in *Raymond v. Fitch* (1) is not in point except for the dictum of Lord Abinger C.B., who said "the maxim that 'Actio personalis moritur cum persona' is not applied in the old authorities to causes of actions on contracts, but to those in tort, which are founded on malfeasance or misfeasance to the person or property of another, which latter are annexed to the person and die with the person, except where the remedy is given to the personal representative by the statute law." The decision of the majority of the judges in *Osborn v. Gillett* (2) is in the defendants' favour. That was an action for the loss of service of a daughter and for burial expenses. Pigott B. said: "It is admitted that no case can be found in the books where such an action as the present has been maintained, although similar facts must have been a matter of very frequent occurrence"; and, later: "We are not at liberty to disregard the law thus established so long ago and expressly recognized by the Legislature, nor in effect to add by the decision of this Court another clause to Lord Campbell's Act. For these reasons as regards the loss of service, therefore, I think this action is not maintainable, and the same reason applies also to the expense of the burial."

Kelly C.B. in his judgment agreed with Pigott B., Bramwell B. on the other hand, in his dissenting judgment, thought that the action was maintainable, but none of the cases which he cited, when carefully examined, are opposed to the defendants' present contention; and *Reg. v. Vann* (3), upon which Bramwell B. relied as to the funeral expenses being recoverable, does not bear out that proposition. There was no decision in that case that a person is legally bound to bury his child; all that was decided was that the guardians could recover the funeral expenses which they had incurred in burying the child if the father had means, not that the father himself was under a duty to bury it. If the father were under a legal liability to bury his child, a failure on his part to perform that duty would render him liable to

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(1) (1835) 2 Cr. M. &amp; R. 538.

(2) L. R. 8 Ex. 88.

(3) (1851) 21 L. J. (M.C.) 39.



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[LORD ALVERSTONE C.J. *Reg. v. Vann* (1) seems to be an authority for the proposition that a father who has the means is bound to bury his child.]

There is no poor law statute which compels a father to bury his child. It was suggested in *Reg. v. Stewart* (2) that at common law someone was liable to bury the body decently.

[SIR GORELL BARNES P. Bramwell B. put the liability for the funeral expenses on the ground that an obligation had been imposed on the father through a wrongful action, for which the defendant was responsible.]

In *Hubgh v. New Orleans and Carrollton Ry. Co.* (3), an action by the widow to recover damages for the loss of her husband, Eustis C.J. laid down the law as follows: "We consider it unquestionable, that no civil action can be maintained under the common law by the relations, for the death of a free person"; and Bowen L.J. in *The Vera Cruz* (No. 2) (4) stated that "the killing of the deceased per se gives no right of action at all, either at law or under Lord Campbell's Act."

[SIR GORELL BARNES P. Bowen L.J. was not there dealing with the question of funeral expenses. Why should not an action lie for loss of service through death? The reason cannot be that the maxim "*Actio personalis moritur cum persona*" applies.]

The true reason why such an action does not lie was stated by Ritchie C.J. and Gwynne J. in *Monaghan v. Horn.* (5) Ritchie C.J. said: "No civil action can be maintained at common law for an injury which results in death. The death of a human being, though clearly involving pecuniary loss, is not at common law the ground of an action for damages, and therefore until the passing of Lord Campbell's Act, there was in England no right of action for the recovery of damages in respect of an injury causing death"; and, later, he continued:

(1) 21 L. J. (M.C.) 39.

(2) (1840) 12 A. & E. 773.

(3) (1851) 6 Louisiana Annual

(4) (1884) 9 P. D. 96.

(5) (1882) 7 Canada Sup. Court

R. 495, 498.

“Shearman and Redfield on Negligence says, . . . ‘Obviously, the deceased person never would have had a cause of action for his own death; therefore none could survive to his legal representatives, even if the law had allowed, as in fact it did not allow, a cause of action for an injury to the person to survive him. The husband or master of the deceased was not allowed to sue, because the only damage recognized by the law was the loss of service during the lifetime of the servant, and the death of the servant, therefore, worked no injury to the master of which the law could take notice. And, if the act causing death amounted to a felony, the general rule of the common law, forbidding any civil suit upon a felony, would alone have sufficed to exclude a claim for damages. Whatever may be said of the logic of these arguments, it is certain that the conclusion thus reached formed a settled doctrine of the common law. No one, whether as executor, master, parent, husband, wife or child, or in any other right or capacity whatsoever, could maintain an action for damages on account of the death of a human being.’”

Gwynne J. said: “There does appear to my mind good reason why, where death is instantaneous, the action should not be maintainable, and why, when death is not immediate but the injury eventually results in death, no damages should be recoverable for any portion of time subsequent to the death. . . . The master’s claim to the services of his servant arises out of a contract with the servant, and the right to compensation for loss of services is based upon and commensurate with the continuing existence of the contract, in virtue of which alone they are due and can be claimed. If then a servant be injured by the tort of a third person, and can no longer render to his master the services due under the contract of service, both master and servant have their separate action for the damage accruing to each from this injury, but the measure of the master’s damage is the loss of service to which he was entitled under the contract of hiring with the servant. The contract of service still continuing . . . the master is entitled to compensation for the loss of such services still due; but . . . supposing that the servant, finding himself incapable by reason of the injury received, of rendering any further service . . . declines to continue in the service of the

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master any longer, and in express terms puts an end to the contract of service, can it be said that the master would nevertheless still be entitled to recover damages from the person who injured the servant for loss of service during any portion of time subsequent to the servant so terminating the contract of service? The answer must clearly, in my judgment, be in the negative, and for the reason that, the contract of service being terminated, the master cannot be entitled to demand compensation for the loss of services to which he is no longer entitled. The gist of the master's action is . . . that the act of the wrong-doer has deprived the master of the benefit of services to which he continued to be entitled under a still existing contract with his servant, so when the death of the servant results from the injury, the contract of service and the master's claim to any future service thereunder is conclusively determined, and so all claim for damages for loss of service subsequent to the death must cease. In my mind . . . when the death of the servant occurs (no matter from what cause occurring) the contract of hiring being determined, the right of the master to all service under the contract ceases, and such right ceasing, all claim for damages for loss of service must cease also."

That judgment shews that the distinction in principle between the case where death is instantaneous, and where that is not the case but death ultimately ensues, is that where death is instantaneous the contract of service is terminated; but where the servant is not killed at the time of the accident the contract continues, and the master suffers loss by reason of the servant's incapacity to perform it. That reasoning applies. In that case Ritchie C.J., Gwynne J., and Henry J. agreed with the judgment of the majority of the Court in *Osborn v. Gillett*. (1) In the present case there was no loss of actual service, but only of the possibility of future service. Funeral expenses can only arise after the death of a person, and no action can be brought against a tort-feasor for anything that has arisen after the death of the person caused by his negligence. Phillimore J. in *Bedwell v. Golding* (2) held that a father was entitled to recover for the funeral expenses of his child on the ground that he was bound

(1) L. R. 8 Ex. 88.

(2) (1902) 18 Times L. R. 436.

to bury his daughter, and distinguished *Dalton v. South Eastern Ry. Co.* (1) on the ground that there the plaintiff was under no obligation to bury the deceased. But the judge appears to have been under a misapprehension as to the duty of the father to bury his child.

[LORD ALVERSTONE C.J. In *Dalton v. South Eastern Ry. Co.* (1) the deceased son was twenty-seven years of age and living away from his parents, and, therefore, the father could not be liable for his burial: that was the distinction Phillimore J. drew in *Bedwell v. Golding*. (2)]

The poor law statutes impose no obligation as to paying funeral expenses of persons. No distinction in this respect has been drawn as to age. If a parent has means he ought to bury his child, and if he does not, then the guardians of the poor can bury the body and recover the expenses from the parent. *Dalton v. South Eastern Ry. Co.* (1) was a case under Lord Campbell's Act, and Willes J. there held that funeral expenses were not recoverable, as the subject-matter of the statute was compensation for injury by reason of the relative not being alive, and there was no language in the statute referring to the cost of the ceremonial of respect paid to the memory of the deceased in his funeral. In *Boulter v. Webster* (3) the claim for the funeral expenses of a child was given up as not maintainable.

This is not a case to which the maxim "*Actio personalis moritur cum persona*" applies, because the father does not simply represent his dead child. But it is clear from it having been found necessary to pass Lord Campbell's Act that there must have been some legal principle which prevented the father having a right of action at common law where the child was killed. That principle was that the instantaneous death of the child deprived the father of any right of action. The death of the child was an absolute bar to any action. The only ground upon which a cause of action could arise would be that some proprietary right of the father's had been infringed: Bacon's Abridgement, 7th ed. vol. 7, "Trespass," 667 (E). But one person can have no property in another person. In the present

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(1) (1858) 4 C. B. (N.S.) 296.

(2) 18 Times L. R. 436.

(3) (1865) 11 L. T. 598.



C. A. case no proprietary right was infringed: *Harse v. Pearl Life Insurance Co.* (1); *Robert Marys's Case.* (2)

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*T. Mathew (J. Eldon Bankes, K.C., with him), for the plaintiff.* Funeral expenses are recoverable both at common law and under Lord Campbell's Act. The judgment of Bramwell B. in *Osborn v. Gillett* (4) was right. It constitutes the argument on behalf of the present plaintiff. *Reg. v. Vann* (5) shews that a father is under a legal liability to bury his child. In *Dalton's Case* (6) the judgment had relation to the fact that the son was a person of mature age whom the overseers were bound to bury. The funeral and mourning expenses were therefore treated as being in the same category.

[LORD ALVERSTONE C.J. *Franklin v. South Eastern Ry. Co.* (7) and *Pym v. Great Northern Ry. Co.* (8) appear to shew that the funeral expenses are not recoverable under Lord Campbell's Act.]

Sect. 2 of Lord Campbell's Act shews what expenses are recoverable. The plaintiff was compelled to incur the funeral expenses, and they are recoverable under s. 2 of Lord Campbell's Act as being the injury he suffered and which resulted from the death. The liability to pay them has been imposed upon him by the negligence of the defendants. This is an injury caused by the death which is within the statute. In *Boulter v. Webster* (9), *Dixon v. Bell* (10) was not cited. That case shews that a master is entitled to recover the expenses incurred in healing wounds inflicted on his servant. If he can do this, why should he not be entitled to recover expenses necessarily incurred where the servant is killed? The decision of the majority of the Court in *Osborn v. Gillett* (4) has not been received with approval by text writers: see Pollock on Torts, 7th ed. pp. 62, 63, 64, 224 (n.). It is supported only in Beven on Negligence, 2nd ed. pp. 210, 211.

(1) [1904] 1 K. B. 558.

(2) (1612) 9 Rep. 111b.

(3) (1905) Times Newspaper,  
July 13, 1905.

(4) L. R. 8 Ex. 88.

(5) 21 L. J. (M.C.) 39.

(6) 4 C. B. (N.S.) 296.

(7) (1858) 3 H. & N. 211.

(8) (1863) 4 B. & S. 396.

(9) 11 L. T. 598.

(10) (1816) 1 Stark. 287.

[The Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 142, and the Poor Law Amendment Act, 1834 (4 & 5 Will. 4, c. 76), s. 58, were also referred to.]

*Roskill, K.C.*, in reply, referred to *Hall v. Hollander* (1) and *Connecticut Mutual Life Insurance Co. v. New York and New Haven Railroad Co.* (2)

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LORD ALVERSTONE C.J. This case is undoubtedly one of very great importance, and if I thought I could arrive at a clearer view of the points raised in argument by taking time for consideration I should certainly have done so; but I have in my mind, I hope clearly, the contentions on both sides, and particularly that on behalf of the plaintiff, and I therefore do not think I should by further consideration of the case be enabled to add any additional reasons for my judgment. We have practically to decide whether we are to adopt the reasoning of the majority of the Court in *Osborn v. Gillett* (3), or whether we are to give effect to the main arguments contained in the dissenting judgment of Bramwell B. We are told, and I believe it is the fact, that round this decision has raged controversy of very learned men, including Sir Frederick Pollock and Mr. Beven, and I can well imagine persons contending very strenuously that the death of a human being by a wrongful act which in fact causes others to incur pecuniary expenses, which they have legitimately incurred without reference to their strict legal obligations, might be a sufficient ground for a cause of action. But it seems to me, after the best consideration I can give to this case, that that contention goes too far. I agree with the reasoning of the majority of the Court in *Osborn v. Gillett* (3), and I do not think the arguments of Bramwell B. were well founded.

Two claims were made in the present action, one under Lord Campbell's Act and the other at common law. With regard to Lord Campbell's Act, in my opinion the course of authority is far too strong to justify us in saying that an action to recover funeral expenses will lie under that Act. It seems to me that

(1) (1825) 4 B. & C. 660.

(2) (1856) 25 Connecticut R. 265.

(3) L. R. 8 Ex. 88.

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the object of Lord Campbell's Act (as has been pointed out) is to give certain persons a right of action in respect of the same cause of action as could have been relied upon by the deceased if he had not been killed. It cannot be said, I think, that it was for the purpose of altering any rules of common law except in that respect. There have been a number of cases in which funeral expenses have been incurred and claimed—e.g., *Dalton v. South Eastern Ry. Co.* (1), *Franklin v. South Eastern Ry. Co.* (2), and *Pym v. Great Northern Ry. Co.* (3) If the wider proposition contended for by Mr. Mathew, on behalf of the plaintiff, as to the construction of Lord Campbell's Act were sound, the Court might take the view that there are certain persons, relatives, who are entitled to or on behalf of whom some one person may sue by the express provisions of the Act, and that where the action was properly brought by such persons and they had in fact incurred funeral expenses, those expenses were recoverable as damages under Lord Campbell's Act. But in my opinion the reasoning upon which the decisions which have been cited are founded is against that view. By those decisions it has been held that that is not the kind of damage which is in the contemplation of Lord Campbell's Act, but that what is contemplated is the pecuniary loss which has been sustained by one member or the whole of the limited class by reason of a wrongful act in respect of which the deceased could have brought an action had he lived. It seems to me that that reasoning excludes funeral expenses from the damages which are recoverable under Lord Campbell's Act, and it is therefore impossible for us to say that this particular claim ought to fall under a different category. I therefore think, as regards the claim under Lord Campbell's Act, that the authorities are too strong to justify us in saying that Mr. Mathew's argument on behalf of the plaintiff can be supported.

With regard to the claim at common law, it is contended on behalf of the defendants that the preamble to Lord Campbell's Act contains a complete statement of the common law where the death of a person was caused by the wrongful act of another

(1) 4 C. B. (N.S.) 296.

(2) 3 H. & N. 211.

(3) 4 B. & S. 396.

person, and that it shews that at common law no action would lie at the suit of a father for expenses incurred in burying his child. I do not think that is so. I think we must consider the matter a little further. In my opinion the preamble to the Act was intended to lead up to the alteration of the law in the respect which I have indicated, namely, that whereas, before the Act was passed, no action could have been maintained in favour of the particular individuals mentioned in s. 2 in respect of the cause of action which died with the person killed, under the Act an action can be maintained. It is therefore necessary to consider whether an action can be maintained at common law by a father to recover the expenses of burying his child. I have very considerable doubt upon the point, but I think the action cannot be maintained. I doubt whether the duty upon a father to bury his child can be put as high as has been suggested by Mr. Mathew on behalf of the plaintiff. Speaking for myself, I should not have been disposed to doubt that the enunciation of the law in *Reg. v. Vann* (1) is correct, namely, that where a person has means there is an obligation upon him to bury the child. It may be that there is a question whether the preamble in Lord Campbell's Act does not go too far in the recital it contains, but for the purpose of my judgment on this point I assume that there is an obligation on a person who has an infant child, and who has means, to bury the child. Further, although a master can recover damages for loss caused by injury to a servant, the authorities are against the contention that loss caused by the death of the servant can properly be made the foundation of a cause of action. It seems to me that for this purpose any loss by a master on the ground that his servant was killed must be excluded. The jury have in fact found that there was in the present case no pecuniary loss by reason of the child having been killed, assuming it were a servant of the plaintiff. It is therefore necessary to contend on behalf of the plaintiff that there is an obligation on a master to bury his servant, and that the expenses that the master incurs would be recoverable. In my opinion the right of a master to recover in respect of injury to the servant does not assist the plaintiff in his claim to recover the

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funeral expenses as the master of his dead child. The question is whether I ought to hold that the reasoning of Kelly C.B. and Pigott B. in *Osborn v. Gillett* (1) is wrong, and to come to the conclusion that Bramwell B. was right in saying, as he did at the end of his judgment, that the funeral expenses could be recovered. I agree to a certain extent with Bramwell B. when he says that probably *Baker v. Bolton* (2) does not go far as an authority against that view: 100*l.* was recovered, and it does not appear whether the wife's funeral expenses were included or not; and the expression "till the moment of her dissolution" might almost have excluded funeral expenses. But on the main question, if it was intended in *Baker v. Bolton* (2) to enunciate the proposition that no action lies in respect of death apart from statutory enactment, it would, of course, be an authority in favour of the present defendants. What right can be said to be infringed? What is the *injuria* which has caused the *damnum*? The father has no right of property in the child in the sense that he can recover if his property is injured. In this case it seems to me that there is no duty towards the father which has been broken. There is no property of the father which has been injured, and no contract with the father which has been broken. Some breach of duty must be made out, and I can see no ground for any suggestion that there is any duty to the father that has been infringed, or any property of the father which has been injured. It seems to me that this case falls within that class to which reference is made in the notes to *Ashby v. White* (3), viz., where there are certain wrongful acts which may place persons in the position of spending money and yet will not involve a legal liability to make that expenditure good. I am therefore of opinion that the plaintiff's action fails at common law as well as under Lord Campbell's Act. I am aware that I am differing from the view expressed by Phillimore J. in *Bedwell v. Golding*. (4) It seems to me, however, that the decision of Phillimore J. in that case is not an authority which bears upon the right of the present plaintiff at common law.

(1) L. R. 8 Ex. 88.

(2) 1 Camp. 493.

(3) (1703) 1 Sm. L. C. 11th ed.  
p. 240; 2 Ld. Raym. 938.

(4) 18 Times L. R. 436.

In *Bedwell v. Golding* (1) Phillimore J. thought, the action being brought under Lord Campbell's Act, that there was a sufficient distinction between that case and *Dalton v. South Eastern Ry. Co.* (2) upon the ground that there was in *Dalton's Case* (2) no obligation to bury a man twenty-seven years old not residing with his father, but that that rule would not apply in the case of the burial of a child. In my opinion the child's funeral expenses are equally not recoverable under Lord Campbell's Act. I therefore only differ from my brother Phillimore in so far as he was dealing with Lord Campbell's Act. The only real authority in favour of Mr. Mathew's contention in support of the plaintiff's right of action at common law is the judgment of Bramwell B. in *Osborn v. Gillett* (3), but it seems to me that there is not sufficient ground for adopting his view in preference to the judgment of the majority of the Court. The case has now stood for many years, and controversy has raged about it. I think that a proposition which might involve the consequence that death which leads persons to incur pecuniary expenses will give a right of action to recover those expenses goes a great deal too far. In my opinion there was no duty broken, and no legal right infringed, either at common law or under Lord Campbell's Act, which enables this action to be maintained. Therefore, however much I may regret the consequence, I think the contention of the defendants that they are not liable to pay the funeral expenses is well founded, and that the appeal must be allowed.

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SIR GORELL BARNES P. I am of the same opinion. The plaintiff in this case sues as the father of a daughter, and alleges that he has suffered damage through the negligence of the defendants and their servants—of the character of unskilful driving of an omnibus, which struck and killed the girl, and damaged the bicycles which she and the plaintiff were riding. The plaintiff seeks to recover damages for the loss of his daughter's life as being damages which he has sustained through her death; and he bases his claim upon the fact that she was acting in domestic service for him.

(1) 18 Times L. R. 436.

(2) 4 C. B. (N.S.) 296.

(3) L. R. 8 Ex. 88.

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With regard to that claim, however, the jury have found that no actual loss was sustained by him as far as her services were concerned. It appears to me that no previous decision can be found in support of the plaintiff's contention in this case. It is a very remarkable fact that among the whole series of previous decisions there is no case to be found in which this cause of action has been sustained, and, except for the judgment of Bramwell B. in *Osborn v. Gillett* (1), there is practically no judicial authority for saying that this action can be maintained. I gather (although I have not had an opportunity of complete reference) that the American authorities are in the same state. All the American decisions which have been cited are in accordance with the view which prevails in England. It appears to me, for reasons which the Lord Chief Justice has given, that the claim in this case under Lord Campbell's Act cannot be supported, and that if any claim could be maintained it would be necessary to rely upon some common law right for loss of service and consequential damage. I do not myself quite take the view that the recital in Lord Campbell's Act has any real application to a case of this character. It seems to me that the recital and the statute itself are confined to causes of action which do not survive the death of a deceased person, and where, but for the death, an action of a similar character might have been brought by that person (that is to say, for injury sustained), but could not be brought afterwards in consequence of his death. With regard to the common law, it seems to me that the plaintiff fails to make out a case of any right of his having been infringed by the death of the girl. This action was brought to recover damages for loss of service. There is an explanation given in the judgment of Gwynne J. in *Monaghan v. Horn* (2) of a reasonable difference between an action brought for loss of service where the service has been suspended by injury and an action brought where there has been an absolute termination of the service by death. That judgment appears to me to give a very satisfactory reason for the difference between the two positions, namely, where there is a claim for loss of service, and the contract of service still continues, and, on the other

(1) L. R. 8 Ex. 88.

(2) 7 Canada Sup. Court R. 409.

hand, where no claim can be sustained in consequence of the contract absolutely coming to an end by the death of the servant. I am therefore of opinion that, both on principle and authority, no right of the plaintiff in this case was infringed by the unfortunate accident which produced the death of the child. The only remaining point is whether in that state of things the claim for funeral expenses can be maintained. With regard to that, it seems to me that the plaintiff is in a position in which a great many persons have found themselves in consequence of the doctrine of *damnum sine injuria*, illustrations of which are given in *Ashby v. White*. (1) In Smith's Leading Cases, vol. 1, 11th ed. p. 268, there are a number of illustrations of that proposition. Therefore, as to that claim, it seems to me that the plaintiff is confronted with the difficulty which arises out of that proposition. Speaking broadly, it appears to me that the judgments of the majority of the Court in *Osborn v. Gillett* (2) are correct, and my view is in accordance with them.

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FARWELL L.J. I agree. I have nothing to add as regards Lord Campbell's Act, and on the general question as to the common law, the view I take agrees with that of my brothers. Bowen L.J. says in *The Vera Cruz* (No. 2) (3) that "the killing of the deceased per se gives no right of action at all either at law or under Lord Campbell's Act." It has been contended on behalf of the plaintiff that the expense of a funeral, which is said to be a necessary legal expense cast upon the father in this case, will give a right of action. I will assume—without saying that I am at all satisfied of it—that the father is under an actual legal liability, as distinguished from a moral duty, to go to the expense of the burial of his child. It may be that in some cases the guardians might be called upon to bury the child, and the relatives be compelled to repay to the guardians what they paid. But in the present case the father has undertaken the expense of the funeral, and, assuming that there is a legal liability upon the father, as I think there would be upon a husband to bury his

(1) 1 Sm. L. C. 11th ed. p. 240;  
 2 Ld. Raym. 938.

(2) L. R. 8 Ex. 88.  
 (3) 9 P. D. 96.



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wife, it is one of those cases in which pecuniary damage arises from something which is not an infringement of any legal right. It cannot be stated as a proposition of law that the father has a right not to be disturbed or put to expense by having to carry out a legal liability imposed upon him. There are a number of cases of a similar nature referred to in *Ashby v. White*. (1) One occurs to me, viz., that of a man who is not entitled by grant or prescription to lateral support. His house is let down by the removal of his neighbour's buildings, so that it is in a state of danger. Thereupon the public authorities call upon him to make the house safe and prop it up, and he is thereby put to expense, but inasmuch as he has no legal right to support, and has chosen to build on the edge of his own land, the withdrawal of the support and the expense consequent thereon give him no right of action. I cannot see that any right can be alleged, as existing in the father, to be left free from liability to bury his child. That being so, I think there is no cause of action, and that the appeal succeeds.

*Appeal allowed.*

Solicitors for plaintiff: *Druces & Attlee*.

Solicitors for defendants: *Hicks, Davis & Hunt*.

(1) 1 Sm. L. C. 11th ed. p. 240; 2 Ld. Raym. 938.

## SCHLOSS BROTHERS v. STEVENS.

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July 30, 31.

*Insurance (Marine)—Policy on Inland Transit—"All Risks by Land and by Water"—Damage by Insects—Construction of Policy—Liability of Underwriter.*

By a policy of insurance in the printed form of an ordinary Lloyd's policy, with the addition of the following clauses in type or writing, goods were insured at and from "on board the import vessel at Savanilla <sup>and</sup> <sub>or</sub> Cartagena to any place or places in the interior of the Republic of Colombia with liberty to proceed to any place or places in the interior irrespective of what may be stated in the invoices <sup>and</sup> <sub>or</sub> elsewhere. Including all risks of robbery with or without violence, all risks of damage by insects and all clauses as attached." The attached clauses contained (inter alia) the following provisions: "Including . . . all risks by land and by water" and "Including risk from the act of God, the King's enemies, fire and all other dangers and accidents of the seas, rivers and navigation, and errors and default thereof"; also "Including all risks excepted by the negligence clause which may be inserted in or attached to charterparty <sup>and</sup> <sub>or</sub> bill of lading."

During the transit between Savanilla, a port in the Republic of Colombia, and Medellin, a town in the interior of the Republic, fourteen bales of the goods were damaged—twelve of them by an abnormal delay in the transit which necessarily involved exposure of the goods to damp, one by accidental wetting, and another by accidental wetting and injury by worms:—

*Held*, that the words "all risks by land and by water" must be read literally as meaning all risks whatsoever. The words were intended to cover all losses by any accidental cause of any kind, and as the damage to the goods was a loss within that category the underwriters were liable for it.

*Pink v. Fleming*, (1890) 25 Q. B. D. 396, distinguished.

ACTION tried in the Commercial Court before Walton J. without a jury.

The plaintiffs' claim was for a partial loss under a policy of insurance, under which the plaintiffs were fully interested, dated August 28, 1901, for 2960*l.*, subscribed by the defendant on 206 bales of merchandise from on board the import vessel at Savanilla to any place or places in the interior of the Republic of Colombia.

The policy was subscribed by the defendant and others to the amount of 130*l.* 10*s.*, the claim against the defendant being for 2*l.* 1*s.* 7*d.*

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The policy was in the ordinary Lloyd's printed form (the clauses in italics in this report being in writing or type) upon goods at and from "*on board the import vessel at Savanilla <sup>and</sup><sub>or</sub> Cartagena to any place or places in the interior of the Republic of Colombia with liberty to proceed to any place or places in the interior irrespective of what may be stated in the invoices <sup>and</sup><sub>or</sub> elsewhere. Including all risks of robbery with or without violence, all risks of damage by insects and all clauses as attached.*"

The above clause was written in at the top of the policy.

The following written clauses were in the margin of the policy :

"*Warranted free of capture seizure and detention and the consequences thereof or any attempt thereat piracy excepted and also from all consequences of hostilities or warlike operations whether before or after declaration of war.*"

"*Including all clauses liberties and exceptions as per bills of lading or charterparty.*"

The attached clauses were on a slip pasted on the policy, and were as follows :

"*With leave to call at all ports and places on the passage intermediate or otherwise for any purpose whatsoever, and all liberties as per bills of lading. Including all risk of craft or boats to and from the vessel, and all risks (including fire) from the warehouse, factory or calender, while in transit by railway or any conveyances, and while in warehouse <sup>and</sup><sub>or</sub> shed, or on wharf whilst awaiting forwarding or shipment and of transhipment and all risks by land and by water by any conveyance, until safely delivered into the consignees' warehouse or elsewhere.*

"*With leave to land, reship, unload and reload the property by the same steamer or any other conveyance, and to let the goods remain at the option of the assured anywhere until it is thought fit or convenient to send them forward.*

"*General average and salvage charges payable as per foreign adjustment, or per York-Antwerp rules, both or either if required.*"

"*Any deviation <sup>and</sup><sub>or</sub> transhipment <sup>and</sup><sub>or</sub> change of voyage not covered by this insurance <sup>and</sup><sub>or</sub> any inaccuracy in description of voyage interest, name of vessel, clauses or conditions to be held covered at an adequate premium to be hereafter arranged.*

"*Including risk from the act of God, the King's enemies, fire and*

*all other dangers and accidents of the seas, rivers and navigation, and errors and default thereof.*

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*"Including all risks excepted by the negligence clause which may be inserted in or attached to charterparty <sup>and</sup><sub>or</sub> bill of lading. Sea-worthiness admitted."*

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There was, in addition, another separate policy, which covered the ocean transit to Savanilla, a port in the Republic of Colombia. The voyage to Savanilla was completed, and no question arose upon that policy. The import vessel arrived on or about August 20, 1901, at Savanilla. The goods were in transit to a town in the interior of the Republic called Medellin, and the route or transit covered by the policy was in stages, from Savanilla by train to Barranquilla, and from there up the river by boat to Puerto Berrio, then by rail from there to Caracoli, and thence to Medellin, the destination of the goods, by mules. A revolution had broken out in the Republic of Colombia in the latter part of 1899, and civil war was still proceeding during the period material in the present case, i.e., the period between August, 1901, and about the time the goods were delivered at Medellin. The claim made in the action was for a particular average loss by damage to the goods. Walton J. was inclined to believe that the railway service and the river service from Savanilla to Medellin—the transport arrangements at the best of times did not appear to be very perfect—were in the latter part of 1901, during 1902, and until the earlier part of 1903 abnormally disorganized, probably in consequence of the strain put upon all the transport arrangements by the revolution that was going on. The policy sued upon was warranted free from capture, seizure and detention, and the consequences thereof, but there was no defence set up under that clause; therefore, although the disorganization of transport was primarily due to the revolution, that did not afford a defence to the action. There was great delay in forwarding the goods in question at Barranquilla, and again at Puerto Berrio. The goods arrived at Savanilla in August, 1901, and they were not delivered at their destination till various dates in the first half of 1903, so that there was undoubtedly very great delay. Walton J. gathered from the evidence before him that the climate in Colombia was



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damp, and possibly the warehousing and storage accommodation was not very perfect. It was, at any rate, likely that if there was an unusual delay in the forwarding of the goods they would be exposed to damage from damp. Owing to the disorganization and delay, there was also the possibility of damage being done to the goods by rain. To some extent he thought the delay was aggravated by causes connected with the weather, and there also appeared to have been a landslip, which interfered with the transport of the goods by railway for some time during the period in question. The damaged bales were fourteen in all. With regard to the nature of the damage and its cause, he came to the conclusion that as to twelve of the bales the loss arose from the extraordinary delay and the abnormal exposure of those bales to damp. As to one bale, the conclusion he arrived at was that it was damaged by accidental wetting as distinguished from damp. It might have been wetted by rain, or possibly it got wet on the steamer in the river. As to the other bale, he came to the conclusion that it suffered from accidental wetting and also from injury by worms.

By his points of defence the defendant pleaded (*inter alia*) that the damage to the goods, if any, was not caused by any peril insured against, and alternatively he claimed to avoid the policy by reason of the concealment by the plaintiffs of a fact known to them and material to the risk, viz., that the deficiencies of means of transport on the insured journey were such as might involve excessive delay in its accomplishment.

As to the defence of non-disclosure of a material fact, Walton J. came to the conclusion upon the evidence that, having regard to what was known, and must have been known, as to the condition of Colombia, there had been no concealment of facts which were material to the risk, and therefore that the defendant was not exempt from liability under the policy on that ground.

*J. A. Hamilton, K.C., and Maurice Hill*, for the plaintiffs. The risk is divided into the ocean risk and the land risk. The question arises upon the interior or land risk. The policy was against all risks. All the attached clauses are incorporated into the policy by the words "all clauses as attached," at the end of the

first-written clause in the body of the policy: *Jacob v. Gaviller*. (1) The first-written clause in the body of the policy deals with all risks in the interior. The expression "all risks" in the attached clauses means all risks. The word "risks" being in the plural shews that perils are meant, and not a risk during a certain period. The expression means all risks incidental to the particular kind of transit. It is quite unnecessary to add the attached clauses to extend the period of the insurance, for the whole period is covered by the first-written clause in the body of the policy.

*Scrutton, K.C.*, and *F. D. Mackinnon*, for the defendant. If the meaning of the policy is that all risks of whatever kind are covered, it is extraordinarily badly drafted. The clause at the commencement, "including all risks of robbery with or without violence, all risks of damage by insects" would be unnecessary. The first attached clause defines the period for which the goods are insured. It extends to the goods during the period they are on craft and during the transit before or after they are on ship, the protection given to the goods while they are in the ship. The policy is essentially a voyage policy, and the first attached clause extends the ship transit to periods before and afterwards. If the expression "all risks by land and by water" meant all risks, the attached clause "including risk from the act of God" would not be required. The expression "all risks" means that all risks for which the underwriters cover the assured while the goods are on ship, the underwriters also cover the assured during the extended period. The policy constitutes an insurance, during the period the goods were carried from the warehouse to the time they were delivered to the consignees' warehouse, against all the risks which are specified in the first part of the policy. "All risks" does not include ordinary dampness on the voyage arising from the climate. Dampness must be caused to all goods. It is analogous to ordinary leakage from a cask. It is in the nature of ordinary wear and tear, for which the underwriters are not liable: *Taylor v. Dunbar* (2); *Pink v. Fleming*. (3)

*Cur. adv. vult.*

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(1) (1902) 7 Com. Cas. 116.

(2) (1869) L. R. 4 C. P. 206.

(3) 25 Q. B. D. 396.

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July 31. The following judgment was delivered :

WALTON J., after stating the facts and holding that the defendant had not made out his defence of concealment of a material fact, continued :—Then comes the question, assuming the policy to be binding, Does it cover the loss in question? That depends largely upon the construction of the policy, and I have felt great difficulty in dealing with the question. I have to look closely at the terms of the policy as to the risks insured against. The policy is in the ordinary Lloyd's form, with clauses added. The clause written in at the top of the policy describes the transit, and these words are added : "*Including all risks of robbery with or without violence.*" Those words are added to make the policy cover robberies which might not perhaps be covered by the ordinary printed form of Lloyd's policy. The clause then goes on, "*all risks of damage by insects and all clauses as attached.*" Damage by insects would not, in my opinion, be covered by the ordinary printed risks in a Lloyd's policy, so these words were intended to add something to the risks insured against. I have now to look at the clauses attached, which must be read as if they were added after the words written in at the top of the policy, i.e., after the word "*insects.*" The clauses attached were on a slip pasted on. The first clause was in these terms : "*With leave to call at all ports and places on the passage intermediate or otherwise for any purpose whatsoever, and all liberties as per bills of lading.*" That had nothing to do with the risks in the sense in which the word had been used in the passage I have read—that is to say, the causes of loss insured against; the clause merely relates to an extension of the voyage. The next clause is as follows : "*Including all risk of craft or boats to and from the vessel, and all risks (including fire) from the warehouse, factory or calender, while in transit by railway or any conveyances, and while in warehouse <sup>and</sup><sub>or</sub> shed, or on wharf whilst awaiting forwarding or shipment and of transshipment and all risks by land and by water by any conveyance, until safely delivered into the consignees' warehouse or elsewhere.*" Then follows this clause : "*With leave to land, reship, unload and reload the property by the same steamer or any other conveyance, and to let the goods remain at the option of the assured anywhere until it is thought fit or*

*convenient to send them forward."* That refers rather to the voyage than to causes of loss insured against. The next clause is as follows: "*General average and salvage charges payable as per foreign adjustment, or per York-Antwerp rules, both or either if required.*" That is followed by a clause as to deviation and transhipment; then comes a clause which is peculiar: "*Including risk from the act of God, the King's enemies, fire and all other dangers and accidents of the seas, rivers and navigation, and errors and default thereof.*" That is a curious clause, as most of the risks mentioned there would be covered by the ordinary list of perils contained in the printed form of policy. That cannot be said as to the act of God, which is rather wider. The words seem to be an echo of the ordinary exception clause in a bill of lading, the clause having at some time been added without reference to the other clauses in the policy to make it clear that the owner of the goods should be protected by his policy in respect of losses as to which he would have no claim upon the bill of lading against the shipowner or carrier. The next clause is no doubt intended for the same purpose; it is: "*Including all risks excepted by the negligence clause which may be inserted in or attached to charterparty <sup>and</sup><sub>or</sub> bill of lading. Seaworthiness admitted.*" The intention of that clause is that the policy should protect the owner of the goods from losses caused by these risks in respect of which he would have no claim against the shipowner. Looking at the policy, including the written words and the clauses attached, it covers in the first place all losses occurring from any of the perils included in a Lloyd's policy in the ordinary form; it undoubtedly includes other risks—risks of robbery with or without violence, damage by insects, &c., some of which may not be within the ordinary printed words of a Lloyd's policy. It is plain, therefore, that the policy was intended to cover something more than the ordinary risks. For the plaintiffs it was contended that during this transit the policy protected the assured from loss by all risks whatever by any conveyance from the time the goods were taken from on board the import vessel at Savanilla until they were delivered at the consignees' warehouse or elsewhere. The plaintiffs said that the words "all risks by land and by water," &c., meant all risks whatsoever. It is very

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difficult to arrive at a conclusion with any certainty as to what the intention of the policy is. In considering the construction of such a policy—a marine policy—one is bound to give effect to all the well-known customs, which are perfectly understood in insurance business, as to the interpretation of such documents ; but, after all, the rights of the parties depend upon the language of the contract. There have been established by a long line of decisions as to the interpretation of the contract contained in a marine policy many rules of construction and there have been read into the contract many well-established customs, the body of which makes up what is called the law of marine insurance. I must look at the whole of the policy to ascertain what the parties mean, not forgetting the effect of such rules and well-known customs. I think that sometimes one is too much inclined to deal with questions of this kind in a historical spirit. In my view it would be wrong to be astute or too subtle in trying to find out what the underwriters probably meant by clauses of this kind from a consideration of similar, but not identical, clauses which have come before the Court from time to time. Effect must be given to the expression “all risks.” The phrase, in clauses somewhat similar, may mean nothing more than the risks insured against in the body of the policy. Taking the common clause, “To include all risks of craft,” that may do no more than extend to the goods while in craft the insurance against all risks which the goods while on board ship are insured against in the body of the policy ; or, in other words, such a clause may operate merely to extend the voyage and not to add to the list of perils mentioned in the policy. But I may add that I do not know any case in which it has been decided that the ordinary clause as to risks of craft adds nothing to the perils insured against, mentioned in the body of the policy. Sometimes underwriters are careful to prevent ambiguity by using the form “all risks hereinbefore insured against.” Referring to the material clause now in question and the words with which it begins, “Including all risk of craft or boats to and from the vessel,” it may be that these words can be read as meaning not all risks of every kind whilst in craft or boats, but all the risk peculiarly incidental to the carriage of goods in boats or craft to or from a

vessel. The clause, however, proceeds "and all risks (including fire) from the warehouse," &c., "while in transit," &c., and finishes with the very general words "and all risks by land and by water by any conveyance until safely delivered." Of course, where parties desire to cover all risks of every kind, it can be done by simply saying "all risks whatsoever"; that is not the form adopted in the policy I am dealing with. The contract as a whole is not logically framed, nor are the words of the clauses happily chosen or with any apparent consideration of the language used in other parts of the policy. It was said for the defendant that, if all risks were covered, why refer specially to risks of robbery with or without violence, negligence, &c.? On the other hand, it is very common to find in such contracts, although perfectly general words are made use of, including practically all risks, special reference to particular perils to which it is desired to draw special attention. *Jacob v. Gaviller* (1) is an illustration of this being done. I have to read this policy as I think it would be reasonably understood by any merchant or insurance broker, and doing so I come to the conclusion that the words "all risks by land and by water," &c., must be read literally as meaning all risks whatsoever. I think they were intended to cover all losses by any accidental cause of any kind occurring during the transit. Does the loss suffered in fact come within that category? Was the damage from some accidental cause? There must be a casualty. I think the loss was so caused. With regard to the twelve bales, there was an abnormal delay in the transit arising from unusual and accidental causes, which necessarily involved an exposure of the goods to damp. In the case of the twelve bales, therefore, the loss was an accidental loss and was covered by the policy. A fortiori the loss of the two remaining bales was covered. The case differs from *Pink v. Fleming*. (2) There goods were insured against (amongst other things) damage consequent on collision. The ship on which the goods were shipped came into collision with another vessel and had to go into port for repairs. For the purpose of such repairs the goods, which were of a perishable nature, had to be discharged, and they were damaged by

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(1) 7 Com. Cas. 116.

(2) 25 Q. B. D. 396.

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the handling necessary for their discharge and reshipment and by the delay. It was held that the collision was not the proximate cause of the loss and that the underwriters were not liable. There, to entitle the assured to recover, a loss had to be proved as the direct result of the collision. Here if all accidental causes of damage were included—and I have held that they were—all that has to be considered is whether the damage that happened was the direct result of some such accidental cause, and I consider that it was the direct result of an accidental cause. There will, therefore, be judgment for the plaintiffs.

*Judgment accordingly.*

Solicitors for plaintiffs: *Waltons, Johnson, Bubb, & Whatton.*

Solicitors for defendant: *T. Cooper & Co.*

J. E. A.

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*Aug. 7.*

[IN THE COURT OF APPEAL.]

FRENCH v. HOWIE AND WIFE.

*Husband and Wife—Principal and Agent—Goods supplied on order of Wife—Judgment against Wife for Part of entire Price—Election not to sue Husband for Balance.*

Appeal from the decision of the majority of the Divisional Court, [1905] 2 K. B. 580, allowed on the facts.

APPEAL from a decision of the Divisional Court on appeal from the Marylebone County Court. (1)

After the opening of this appeal it was clear that the proceedings in the action, both before and after it was remitted to the county court, were irregular and wrong, and that the decision of the majority of the Divisional Court was based on a misapprehension of the facts and the result of the various orders made in the course of the action, which, as ultimately ascertained in the Court of Appeal, shewed clearly, in the opinion of all their Lordships, that the plaintiff, the creditor, had recovered judgment against the wife for part of an undivided debt, and had so treated her in the first instance as liable for the whole. The following summary of their findings and of their judgments is considered all that is necessary for the purposes of this report.

(1) [1905] 2 K. B. 580.

The action was brought in the High Court to recover 26*l.* 11*s.* 6*d.* for groceries supplied by the plaintiff to the defendants, a husband and wife living together, upon the order of the wife. Judgment was signed against both defendants in default of appearance. This judgment was subsequently set aside, on payment to the plaintiff's solicitor of 20*l.*, and liberty was given to the defendants to defend for the balance of the claim.

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The wife admitted her liability to the amount of 24*l.* Subsequently, on an application under Order xiv. against both defendants, the Master, in view of the wife's admissions that she was originally liable for 24*l.*, made an order against her for 4*l.* on account of the plaintiff's claim generally, gave both defendants liberty to defend as to the residue of the plaintiff's claim, and remitted the action to the county court. At the trial the jury found that there was no joint liability of husband and wife, but that credit was given by the plaintiff to the husband alone, and judgment was accordingly entered against him. On appeal by the husband to the Divisional Court it was held by Lord Alverstone C.J. and Kennedy J. (Jelf J. dissenting), distinguishing *Morel Brothers v. Westmoreland (Earl of)* (1), that recovery of judgment against the wife for 4*l.*, although it was part of an entire claim, was not conclusive evidence of an election not to proceed against the husband for the balance, and that the plaintiff was entitled to recover.

The defendant appealed. The appeal was heard on August 7.

*Hume Williams, K.C.*, and *Wilfred Trickett*, for the appellant.  
*Turrell*, for the respondent, the plaintiff.

THE COURT (Vaughan Williams, Romer, and Cozens-Hardy L.JJ.) were of opinion that the judgment of Jelf J. was correct. The only way in which the husband could have been held liable, consistently with the judgment that had already been obtained against the wife for 4*l.*, would be by making out a joint liability of the husband and wife, the very fact which was negated by the finding of the jury. Under these circumstances the case of *Morel Brothers v. Westmoreland (Earl of)* (1) applied, and shewed

(1) [1904] A. C. 11.



C. A. that, the plaintiff having elected to treat her as liable for the  
 1906 whole, it was too late to make out a second liability against the  
 husband.

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*Appeal allowed.*

Solicitors: *Tetley, Tree & Tetley; M. E. Walhouse.*

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[IN THE COURT OF APPEAL.]

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THE KING ON THE PROSECUTION OF THE BOARD  
 OF EDUCATION AND HIS MAJESTY'S ATTORNEY-  
 GENERAL v. THE COUNTY COUNCIL OF THE  
 WEST RIDING OF YORKSHIRE.

*Schools (Education)—Non-provided School—Salary of Teachers—Time occupied  
 in Religious Instruction—Proportionate Reduction from Salary—Power of  
 Local Education Authority to deduct—Elementary Education Act, 1870  
 (33 & 34 Vict. c. 75)—Education Act, 1902 (2 Edw. 7, c. 42).*

The Education Acts, 1870 to 1902, do not impose upon a local education authority the obligation to pay the expense of religious instruction in non-provided schools, and the authority is entitled to withhold such part of the teachers' salaries as may be deemed fairly referable to the time occupied in giving religious instruction.

Judgment of the King's Bench Division reversed by the Court of Appeal (Collins M.R. and Farwell L.J., Fletcher Moulton L.J. dissenting).

APPEAL from a judgment of a Divisional Court, making absolute a rule for a mandamus, directed to the defendants, the county council for the West Riding of Yorkshire, who had made certain deductions from school teachers' salaries on the ground stated in the head-note.

The facts of the case were stated in an affidavit of the deputy clerk of the county council, who was also clerk to the committee of the council acting as the local education authority appointed under s. 17 of the Education Act, 1902. That Act came into operation in the West Riding of Yorkshire in April, 1904. Within the area of the authority there were four schools in respect of which the question involved in this case arose. These schools were voluntary schools, and were denominational either

of the Church of England or of the Roman Catholic Church, and upon the Act coming into operation managers were appointed for each of these schools under the provisions of s. 6 of the Education Act, 1902. One of the four schools was the Kilnhurst National School, Swinton, which was founded and conducted under a trust deed of May 25, 1869, under which the religious teaching in the school was to be in accordance with the doctrines of the Church of England. The head-master was appointed and held his office under contracts which were made before the Education Act, 1902, came into operation, and under those contracts he was bound to instruct the children, under the direction of the clergyman of the parish, in the Scriptures, the Catechism of the Church of England, and the Book of Common Prayer. A schoolmistress was also appointed to the school before the Act came into operation, and she was bound to instruct the children, under the direction of the clergyman of the parish, in the Scriptures and the Catechism of the Church of England.

The local authority before May 1, 1905, requested that a return should be made in respect of this school, to elicit accurate information with regard to the time devoted to religious instruction, and to the proportion of the teachers' time employed in giving such instruction. No return was made, but the local authority used the time tables of the school for the purpose of ascertaining the proportion of time devoted by the teachers to religious instruction as compared with the time devoted to secular instruction, and they came to the conclusion that 10 per cent. of the salaries of the teachers might be fairly regarded as remuneration for the religious instruction given by them. They accordingly deducted from the amounts of the salaries of the teachers 10 per cent., and paid the balance to them after such deduction.

Two others of the four schools were Church of England schools, also established and conducted under trust deeds by the terms of which there was an obligation on the teachers to give religious instruction in accordance with the doctrines of the Church of England. The managers of these schools made returns, in compliance with the request of the local authority,

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C. A.	giving the proportion of the salaries of the teachers that might
1906	fairly be taken to be remuneration in respect of giving religious
REX	instruction. In one case the mistress who gave religious instruc-
v.	tion was appointed after the Act of 1902 came into operation.
WEST	The local authority adopted the percentage given by the managers,
RIDING OF	and made a corresponding deduction from the salaries of the
YORKSHIRE	teachers.
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The fourth case was that of a Roman Catholic school, also established under a trust deed by the terms of which the master was bound to give religious instruction in accordance with the tenets of the Roman Catholic Church. No return was made by the managers, and the local authority estimated by means of the time tables the proportion of the teacher's salary that might fairly be attributed to the giving of religious instruction, and made a deduction from the agreed amount of his salary and paid him the balance.

An application was made in respect of these deductions from the salaries of the teachers of the four schools to the Board of Education, requesting the Board, under the authority of s. 16 of the Act of 1902, to compel the local education authority to fulfil their duty by payment to the teachers of the salaries due to them. A public inquiry was held by direction of the Board, and a report was made, and the Board thereupon, by order dated July 21, 1905, ordered the county council to pay to the teachers the balance of salary due to them, but withheld by the county council as the amount which they deemed proportionate to the time spent by the teachers in giving religious or denominational instruction during the school hours. The county council did not comply with this order, and a rule nisi was obtained calling upon them to shew cause why a writ of mandamus should not issue directing them to obey the order of the Board of Education. Upon argument before Ridley J., Darling J., and Bray J. the rule was made absolute. The judgments delivered on June 21 by the learned judges were as follows:—

RIDLEY J. We are all of opinion that this rule must be made absolute.

The question which arises is somewhat novel, and, although

it has apparently been answered in one way by all county councils excepting the defendants, I quite recognize, as it was contended on their behalf, that the Court must construe the statute itself, and arrive at its conclusion as to the meaning of the provisions the statute contains irrespective of what public opinion may have been on the subject. I say that, although it would not be quite honest not to admit that one cannot keep altogether out of one's mind the fact that there has been an almost universal opinion as to the way in which this Act is to be read. That, however, has little to do with us; we are to interpret the statute according to the provisions which it contains.

At the time the Education Act, 1902, was passed there were public elementary schools, elementary schools which did not come within the definition of "public," and school board schools. Under the code of the Act of 1870 and the subsequent Acts, the public elementary schools were controlled as to religious instruction, generally speaking, by s. 7 of the Act of 1870, and the school board schools were controlled in that respect by s. 14, sub-s. 2, commonly known as the Cowper-Temple clause. Denominational religious instruction was not allowed in either public elementary schools or in school board schools. I say "denominational" because it is the generally accepted word, although I do not believe that we all of us are agreed upon the precise meaning of that term; but that was the condition of things when the new Education Act, 1902, was passed. It was then necessary to deal with that state of things. The Legislature had to provide, in making a new education authority, for the control of and responsibility for the instruction given in the schools, and provision had also to be made as to who was to bear the expense of it. Now, those two objects must be kept separate. I think a great deal of confusion is introduced into the subject by not carefully noticing—and one is apt not to do it at first—the difference between the terms used in s. 5 of the Education Act, 1902, and those used in s. 7 of that Act. In my opinion it is quite clear that s. 5 is not the financial section. It is the section which controls and deals with the responsibility for the education given in these words: "The local education authority" (that is, the county council or the new local education authority) "shall, throughout their area, have the powers and

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duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in public elementary schools not provided by them. . . .” In my opinion that is not a financial provision, but it simply states who is to have the responsibility and the control of the instruction to be given in the schools. With regard to schools which were provided schools (formerly school board schools), the whole responsibility is passed to the local education authority, but with regard to those which are not provided it is only the control of all secular instruction. That is the provision made by the statute. The Legislature enacted that, so far as secular instruction goes in the public elementary non-provided schools, the local education authority is to have the control, but not further. The distinction is between the provided and the non-provided schools. In the one there is the complete control ; in the other there is only a control of all secular instruction. With regard to the cost of this education and the instruction so given, I think it might possibly be argued that, so far as the provided schools go, the first part of s. 5 would in some sort of way include that under the powers and duties of the school board and school attendance committee. But I think there is no ground for saying that in respect of non-provided schools there is, under s. 5 of the Act of 1902, any right or duty on the part of the local education authority to provide money for them. It is not till s. 7 is reached that anything of the sort can be found. That section deals, to use the words in the marginal note, with the maintenance of the school. I do not rely on the particular marginal note, but it is, I think, a correct description of the section, which says that : “The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers.” Now, pausing there for a moment, that is the general clause applying to all schools, provided or not provided, and it says that the maintenance and keep of all those schools is to be found by the local education authority. I think the argument in support of the rule that you cannot maintain

and keep all public and elementary schools and yet leave some thing which is part of their duty unprovided for is sound; and that that includes not only the fabric of the schools, but the instruction given in them and the instruction in all branches which are included in the general curriculum, and unless those branches are properly maintained and kept up, the duty of the local education authority is not performed. Having gone so far, there is an exception made, viz., "other than expenditure for which, under this Act, provision is to be made by the managers." That exception, I think, has principally reference to s. 7, sub-s. (1) (*d*). The managers are to do something for the keeping of the house in good repair and in other ways concerning the fabric of the school-house and dwelling-house. The section continues, "but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with." The Legislature therefore says, in effect: "We have ordered that the local education authority shall pay for all public elementary schools and keep them efficient, but we recognize that in so doing we have ordered them to maintain a thing which is not under their control or responsibility, for we have excepted from the control section (s. 5) the religious instruction in the unprovided schools. We therefore put in certain conditions which are to be observed in order to continue the liability of the local education authority to make good the cost of those schools." Having thus given the right to the managers to call upon the local education authority to maintain the school, it puts conditions upon them. Sect. 7, sub-s. 1 (*a*), says that, as to secular instruction, "the managers of the school shall carry out any directions of the local education authority" (that is an amplification, as it seems to me, of the provisions contained in s. 5), "including any directions with respect to the number and educational qualifications of the teachers." If the managers fail to carry out any such directions, then the local education authority is to have power to carry out their own directions; but, having gone so far as that against the managers in giving the local education authority a kind of control over their management, it says that in giving those directions the local education authority is not to interfere with reasonable facilities for religious

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instruction during the school hours. Therefore the Legislature in effect said to the local education authority: "You have a power of interference, but we preserve absolute the right of the managers in respect to religious instruction." There is another condition of importance as shewing that it is for the purpose of the trust—for the purpose of that particular denominational (as it is called) system of education—that that is done. As I understand sub-ss. 4 and 6 of s. 7, their effect is that the trustees or managers having obtained what I may call a privilege are not to use it in another way; it is only in respect of the provisions of the trust deed relating thereto that this right is given to them. I think that it is clear on what basis the law was intended by the Act of 1902 to rest. It was intended that the local education authority should pay for the religious instruction in these non-provided schools as well as in the provided. Their control ceased where the religious instruction began, with this exception, that there might possibly be, upon a question arising between the managers of the school and the local education authority upon such a matter, a determination of such question by the Board of Education: but in the first resort and in the first instance the local education authority has no control over religious instruction. Now that, I think, settles the question which we have been asked to decide. There are some other questions which have been raised with regard to the appointment of teachers and other matters. With those I think we have nothing to do. The duty of the local education authority begins and ends in this matter, at all events in the first instance, with paying the money. For these reasons I think that the rule should be made absolute.

DARLING J. I have come to the same opinion, although I confess that during the argument I have had considerable doubt as to whether the contention on behalf of the defendants was not the right one. I was, however, inclined to doubt whether it could be well founded, for this reason, that it really sounded too good to be true. If that contention had been right, there would have been no shadow of an excuse for any argument that the Act of 1902 had brought about an injustice by calling upon a person

to pay for denominational religious education of which he might not approve. That religious education would not have been paid for out of the rate; while the liability to pay for religious education not given in the non-provided schools, but in the provided schools, would have remained. Of course, therefore, a pure secularist might have objected to paying rates which went to support them, and so might a person who thought no education ought to be given but the religious education of his own denomination. On behalf of the Crown it was admitted—and, indeed, it is obvious—that in the provided schools where education is given in religious matters, where the Cowper-Temple clause is taken advantage of, religious education is given although it is not the religion of any existing denomination, except in so far as Cowper-Temple may be said to have founded a novel denomination of his own. That species of religious education is, I gather, given in every provided school in the country except one; and therefore religious education is paid for out of the rates and out of the parliamentary grant in every one of the provided schools in this country except one. Now, although I was much taken, I confess, with the argument on behalf of the defendants, I think that when it is carefully examined one can see that it is wrong. A necessary part of the argument was that religious education is not elementary education within the meaning of the Education Acts, 1870 to 1902. But I think that contention cannot be supported. I think elementary education within the meaning of the Acts includes two things. It includes secular education of an elementary character, and religious education. In the provided schools it includes, in form, religious education such as is not contrary to the Cowper-Temple clause. In the non-provided schools the elementary education, I think, includes that particular kind of denominational religious education which is provided for in the trust deed governing the particular non-provided school. I do not think it is necessary to go back into the early history of this legislation, yet, if we look at s. 5 of the Act of 1902, we find that it provides that “The local education authority” (that is, the county council) “shall . . . be responsible for and have the control of all secular instruction in public elementary schools not provided by them.” That section gives them the control of

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the secular education in those schools. Sect. 7 provides : "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers." That section applies to provided as well as non-provided schools. Sub-s. 1 (a) provides that "The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school," but that "no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours." I think that the meaning of those provisions is that the county council, being the education authority, shall control the secular instruction in the sense that they may say, within the limits of their powers, what sort of instruction there shall be, and also when it is to be given, at what hours, and may give other similar directions. There is no power given to them to control religious instruction. That depends on the provisions contained in the trust deeds as to the kind which is to be given. Neither they nor the managers of a Catholic school—I mean a school of which the trust deed prescribes that the doctrines of the Roman Church are to be taught—would have the power to say that something shall be learned which would not satisfy the trust deed ; that the doctrines of the Church of England or the Church of Scotland, or something of that kind, should be taught. They would have no power to do so ; and, as far as the county council goes, they would have no power to say anything about the religious instruction, it seems to me, except that in arranging for the secular instruction time is to be left so that religious instruction may be given within the school hours, and there are to be other facilities, such as a place in which it shall be given. Now, in my opinion, s. 7, sub-s. 6, of the Act of 1902, which is called the Kenyon-Slaney clause, shews who is to control the religious education. It provides that "Religious instruction given in a public elementary school not provided by the local education authority shall, as regards its character, be in accordance with the provisions (if any) of the trust deed relating

thereto, and shall be under the control of the managers." There the same word, viz., "control," is used regarding the character of religious education as is used in the early part of s. 7, where control of expenditure is given to the local education authority, the county council. It seems to me that s. 7, which provides that the local education authority shall maintain and keep efficient all public elementary schools, means that a non-provided school would not be kept efficient if religious instruction were obligatory by its trust deed and no religious instruction professedly of the kind intended by the deed were given in the school; but if any such religious instruction were given, then I think that the local education authority must pay, and that if religious instruction professedly, but not really in accordance with the trust deed, were given, it would be in consequence of the neglect of proper control of religious education by the managers, a control which is given to the managers by s. 7, sub-s. 6—the Kenyon-Slaney clause. That would be a matter as to which no complaint could be made of the local education authority; but it is a matter in regard to which complaint could be made concerning the managers. It seems to me that if the managers of a non-provided school said: "We are going to, and we do, give religious instruction," then the local education authority would be bound to pay them the money in order to keep the school efficient. Part of the efficiency in a non-provided school is the giving of religious instruction according to the trust deed; just as part of the efficiency in a provided school would be the giving of secular instruction, and also of some religious instruction not violating the terms of s. 14 of the Education Act, 1870 (33 & 34 Vict. c. 75)—the Cowper-Temple clause. If, therefore, the managers professed to give the kind of instruction which the deed obliges them to give the county council could not complain; but if the managers, in violation of their duty, having the control of religious education given them by s. 7, sub-s. 6, of the Act of 1902—the Kenyon-Slaney clause—did not give that kind of instruction which would satisfy the terms of the trust deed, that is a matter as to which proceedings could be taken against them, but not against the county council. I think that those considerations clear up the chief difficulty which I have felt and

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C. A. clear it up in the way that I have indicated, and therefore I am  
1906 able to agree in the conclusion that my learned brothers have  
arrived at, although, as I have said, the opposite one was the  
most tempting according to my view.

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Darling, J.

BRAY J. I am of the same opinion, and I agree with the reasons given by my brother Ridley. I think it clear that the liability to pay the whole of these salaries is thrown on the local education authority by the earlier words in s. 7 of the Act of 1902: "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary." Those words seem quite wide enough and apt to include the whole of the salaries of these teachers. At the time of the passing of the Act it was perfectly well known that, as a rule, denominational religious instruction was given in all non-provided schools, and this instruction was given in school hours by the regular teachers, who were paid an inclusive salary for all teaching. It is these schools, and consequently the teaching therein that the authority are bound to maintain and keep efficient. If it were necessary I think a good deal of assistance is given by the latter portions of the section, but I should be prepared to come to that conclusion without the assistance of those at all. But there are one or two observations which I should like to make. If the local education authority are not bound to pay the whole of the teachers' salaries, who is bound to pay them? It must be the managers. It is the managers who have to enter into contracts with the teachers to pay them, and, if the local education authority do not find the whole, the managers must pay out of their own pockets this 2 or 10 per cent., as the case may be, for religious instruction. Now the managers, as to two of them, are public officers; they have nothing to do with the schools. They are appointed by local authorities, and, surely, if a financial responsibility is to be thrown upon them, it would have been provided for in terms by s. 7 of the Act of 1902, which is the financial section. Certain pecuniary responsibilities are thrown upon them, but they are defined by the section itself. Sub-s. 1 (d) provides that "The managers of the school shall provide the

school-house free of any charge, except for the teacher's dwelling-house (if any), to the local education authority for use as a public elementary school, and shall, out of the funds provided by them, keep the school-house in good repair, and make such alterations and improvements in the buildings as may be reasonably required by the local education authority." Now surely in that sub-section or in some other it should have been provided, if the contention on behalf of the defendants is right, that the managers should, out of the funds provided by them, pay for all the expenses connected with religious instruction. But there is no such section. Sub-s. 2 of s. 7 throws a further responsibility upon them, but during what time? Not in school hours, but out of school hours, and religious instruction is to be given in school hours. Again, it is a most complicated matter to say what proportion of the salaries of teachers ought to be considered as due to the time when they are giving religious instruction, and no provision is made for determining the proportion, or for deciding any dispute with regard to it. There would be, besides that, expenses going on during all school hours, e.g., a proportion of the wear and tear, the gas bill—a number of expenses—and yet there is no provision for payment of any of these by anybody except the local education authority. All these considerations point strongly, as it seems to me, to the fact that the whole of the expense is intended to be thrown on the local education authority. There is one further observation that I desire to make by way of caution. With regard to sub-s. 4 of s. 7, I do not think it is necessary, for the purpose of this decision, to consider what is the exact meaning of sub-s. 4. It is a difficult section to deal with, and I prefer to give no opinion upon it.

*Rule absolute.*

The defendants appealed.

July 19. *Danckwerts, K.C.*, and *C. H. Sargant*, for the defendants. Under the Elementary Education Act, 1870, there were two kinds of public elementary schools. There were the board schools, since known as provided schools, and the elementary schools, established and supported by voluntary effort, since

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called non-provided schools, which by compliance with certain conditions became public elementary schools within the meaning of the Act. By s. 7 of the Act every elementary school conducted in accordance with the regulations contained in that section became a public elementary school within the meaning of the Act. Among other regulations, it was provided by sub-s. 2 of s. 7 that, if any religious instruction was given in the school, it should be given at the beginning or end of school hours, and a parent should be at liberty to withdraw his child from it; and by sub-s. 4 the school had to be conducted in accordance with the conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant. Those conditions were by s. 97 declared to be those contained in the minutes of the Education Department in force for the time being, commonly called the "Code." By s. 97 it is expressly enacted that those conditions shall provide that an annual parliamentary grant shall not be made in respect of any instruction in religious subjects, and that they shall not require that the school shall be in connection with a religious denomination, or that religious instruction shall be given in the school. There was no inspection by the inspectors of the Education Department as regards the efficiency of any religious education given in the school. The board schools were by s. 14, sub-s. 1, of the Act to be conducted as public elementary schools. There was no obligation to give any religious instruction in them, but any such instruction which might be given had to be of an undenominational character, it being provided by sub-s. 2 of s. 14 that no religious catechism or religious formulary distinctive of any particular denomination should be taught in the school. By s. 74 the school board had power to make by-laws with regard to the compulsory attendance of children at school, but it was provided that no such by-law should prevent the withdrawal of any child from any religious observance or instruction in religious subjects. By s. 18 of the Act of 1870 it was provided that the school board should "maintain and keep efficient every school provided by such board." That obviously meant that they should maintain and keep efficient every such school for the purposes of secular education, for there was no obligation

to give any religious instruction, which was left entirely optional. A voluntary, non-provided elementary school could, by complying with the conditions laid down in the Act as constituting a public elementary school, obtain the annual grant. There was no statutory obligation imposed on the trustees or managers of such schools to give religious instruction, and no inspection of them by the inspectors of the Education Department as regards the efficiency of such instruction if given. The general scope and effect of the Elementary Education Act, 1870, was that the Legislature carefully confined the provisions for education which it was making to secular education, and abstained from making any provision for religious instruction, though it allowed it to be given in public elementary schools, subject to certain conditions. That being the state of things under the Act of 1870, the Education Act, 1902, was passed. One of the main objects of that Act was no doubt to afford relief to the non-provided schools by shifting part of the burden theretofore resting on their supporters on to the rates. The question really is to what extent the relief so given was intended to go. It is submitted that, having regard to the general policy of the Legislature as apparent throughout the Elementary Education Act, 1870, namely, that the State should leave religious education altogether an optional matter, so far as it was concerned, and should make no provision for denominational religious education, it was not intended to reverse that policy, but only that the non-provided schools should be relieved of expenditure attributable to the purposes of secular instruction, such as making good the wear and tear of the fabric of the school occasioned by its use as a public elementary school. By the Act of 1902 school boards were abolished, and the council of every county and of every county borough is made the local education authority. By s. 5 it is provided that the local education authority shall throughout their area have the power and duties of a school board under the Act of 1870, and shall also "be responsible for and have the control of all secular instruction in public elementary schools not provided by them." The words "responsible for all secular instruction" appear to mean "responsible for making financial provision for all

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secular instruction," for any other meaning would be included in the words "have control of all secular instruction"; and therefore, by implication, responsibility for making financial provision for religious instruction is excluded. In the case of a non-provided school, therefore, all the local education authority is made responsible for providing, and has the control over, is secular education. By s. 7, sub-s. 1, the local education authority are "to maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers." It is to be observed that the words "maintain and keep efficient" are taken from s. 18 of the Elementary Education Act, 1870, in which section they clearly mean "maintain and keep efficient as regards secular education." The words "maintain" and "keep efficient" are collocated as applicable to the same subject-matter, and, therefore, it is impossible to extend the subject-matter in respect of the term "maintain" beyond that to which the words "keep efficient" can be applicable. The local education authority have no power to keep efficient the religious instruction, the control over which is left with the managers, and not given to them. The contention for the respondents involves the anomalous result that the local education authority are bound to provide out of the rates for, and keep efficient, instruction over which they have no control. There is no contractual relation between the teachers and the local education authority in the case of a non-provided school: *Crocker v. Plymouth Corporation*.<sup>(1)</sup> Under s. 13 of the Act, which deals with endowments, the local education authority are entitled to have paid to them such income of a non-provided school as "must be applied for the purposes of a public elementary school for which provision is to be made by the local education authority"; and the amount which they so receive is to be credited by them in aid of the rate levied for education purposes. The income which is so transferred to the local education authority is only that which is applicable for the purposes of secular education, and, if that be so, it is strong to shew that they are not bound to make financial provision for

(1) [1906] 1 K. B. 494.

religious instruction. [They also cited *Reg. v. Cockerton* (1); *Dyer v. London School Board* (2); *Young v. Cuthbert*. (3)]

*Sir J. Lawson Walton, A.-G.*, and *S. A. T. Rowlatt*, for the Crown. The Education Act, 1902, contemplates the maintenance by the local education authority of non-provided schools as they existed previously, namely, as integral institutions, an essential feature of whose curriculum was the provision of religious instruction. No provision is made in the Act for apportioning the salaries paid to teachers, and attributing so much to religious and so much to secular instruction, as the defendants have arbitrarily done in this case. If the principle on which they have acted is correct, they ought logically to be entitled to do the same in regard to all the expenses of a school in which religious as well as secular instruction is given, as, for instance, expenses of repairs and of lighting and warming the school while religious instruction is being given. It is obvious that this is not what was intended, and the Act provides no machinery for such an apportionment. The Act of 1902 is for the first time bringing within the category of publicly managed schools a class of school which had not theretofore been subject to such management, namely, non-provided public elementary schools. Such schools had previously derived no support from the rates, and had been entirely and for all purposes under the control of the managers appointed in conformity with their trust deeds. When the support of such schools was thrown upon the rates it was contemplated that, by way of quid pro quo, and in return for the relief thus afforded, public control of them to a certain extent and in certain respects should be provided for by the Act. It was necessary, from that point of view, to provide expressly by s. 5 that in future the local education authority should be responsible for, and have control of, secular instruction in such schools, and no implication arises, as suggested, from that provision that the responsibility of making financial provision quoad religious instruction cannot be intended to be thrown on the local education authority. The direct control of the religious instruction is no doubt to be

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(1) [1901] 1 K. B. 726.

(2) [1902] 2 Ch. 768.

(3) [1906] 1 Ch. 451.



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exercised by the managers, but by s. 6 of the Act it is provided that a certain proportion of the managers shall in future be appointed by the local education authority, and so a certain amount of popular control over the religious instruction is indirectly given as part of the quid pro quo provided for by the Act, in return for the support afforded to such schools from the rates. The provision in s. 7, sub-s. 1, that the local education authority shall maintain and keep efficient all the public elementary schools within their area means that they shall maintain and keep them efficient as educational institutions of the class to which they respectively belong, and with the curriculum of a school of that class, which in the case of a non-provided public elementary school may include religious instruction. Under the Code no doubt the parliamentary annual grant is not given in respect of religious instruction, inasmuch as, for many reasons, it was thought undesirable specifically to subsidize denominational religious education; but, when once the grant has been made, the sum granted becomes part of the funds available generally for the support of the school, and there is no provision for enforcing the application of it to secular education only. It is therefore fallacious to say that up to 1902 no public moneys were ever applicable to religious instruction. In the case of the board schools religious instruction was paid for out of the rates, subject to the condition that it must be undenominational in character. By the Act of 1902 it was intended to give the same right to support out of the rates to denominational schools, subject to a certain amount of popular control being extended to them. It is submitted that the meaning of the legislation was that, in return for the amount of popular control given by the Act over the non-provided schools, all their expenses should be provided for out of the rates, except as and to the extent otherwise expressly provided for by the Act. The local education authority can keep the school efficient as regards religious instruction to a certain extent, although such instruction may not be directly under their control. They have power to inspect the school, and they have power to see that it shall be properly equipped and provided for the purpose of such instruction as well as secular instruction. Their power and duty is to keep the

school efficient up to the point at which the power and duty of the managers begins. They keep the school efficient as regards religious as well as other instruction by providing for the salary of the teacher, who gives religious as well as secular instruction, and for the other expenses, which are attributable to the religious as well as the other instruction. The basis of the argument of the other side is that a school has a kind of dual existence, and is a public elementary school while secular education is given and something else when religious instruction is given ; but that is a fallacy. What is being dealt with is a school as a whole, and not a school in any particular aspect. Take the case of a school board under the Act of 1870 : the board was by s. 18 to maintain and keep every school provided by them, and that is contrasted with s. 14, under which the school was to be conducted under the control and management of the board. A school does not cease to be a public elementary school as soon as religious instruction is given. The only mention of religious instruction is by way of restriction. The board could not be compelled to give religious instruction because the giving or otherwise was under their control ; but if, in carrying out the provision of s. 18 to maintain and keep efficient, they did not spend money for the salary of a person who gave religious instruction, it was only because, having control, they did not in fact provide religious instruction. Now, it is not the case of schools the curriculum of which the authority may control, but of schools the curriculum of which, as to one point, is otherwise fixed. The duty to maintain and keep efficient remains, but the control in certain matters is elsewhere, as in s. 7, sub-s. 7, with regard to the appointment and dismissing teachers. The teachers have a contractual relation with the managers, two of whom are representative of the public. The situation is that there is general responsibility on the part of the local education authority, who are bound to keep efficient all public elementary schools throughout their area, but that the control in certain matters of detail is in the managers. In maintaining efficiency the local education authority cannot split up the fund necessary for that purpose as if the school when religious teaching is going on took up some other character than that of a school which they are bound to maintain

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and keep efficient. The Legislature has given no indication that any expense, except those specifically mentioned in the Act, is to be segregated from the general expense of maintaining, and the fact that certain things are specially mentioned of which the expense is to fall on the managers shews that it could not have been contemplated that the salary of the teachers should be subject to reduction in respect of the time occupied in religious teaching.

*Danckwerts, K.C.*, in reply.

*Cur. adv. vult.*

Aug. 8. COLLINS M.R. read the following judgment:—

The question on this appeal is whether the local education authority are liable to pay the expense of denominational religious instruction in non-provided schools under the Education Act, 1902. The authority, admitting their liability to pay for secular instruction, contended that no duty was imposed upon them to pay for denominational religious instruction, and claimed on that ground to withhold such part of the teachers' salaries as might be deemed fairly referable to religious instruction. The Divisional Court has ordered a mandamus to issue to enforce obedience to an order of the Board of Education made under s. 16 of the Education Act, 1902, enjoining payment of the proportion withheld. The authority now appeal.

In order to justify the mandamus it must appear with reasonable certainty that the statute has imposed the obligation thus enforced. If the obligation exists, it is to be found in s. 7 of the Act of 1902, and nowhere else. That section, therefore, must be carefully examined both by itself and by reference to its place in the chain of legislation on this subject-matter. The words of sub-s. 1 are: "The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers." The obligation here imposed is "to maintain and keep efficient," and that in respect of which the obligation is imposed is "public elementary schools." Two questions therefore present

themselves at once for consideration—what is covered by the word “efficient” and what is connoted by the words “public elementary schools.” Unless the words “maintain and keep efficient” cover denominational religious instruction, and unless denominational religious instruction is embraced in the concept “public elementary school,” the section contains no mandate in relation to religious instruction at all. Moreover, if a duty is imposed it embraces control over the instruction given as well as liability to make good the cost. The subject must be one in respect of which they are placed in a condition equally to perform both duties; they cannot be deemed liable to maintain in the sense of paying the cost unless they are also in a position to secure efficiency by exercising control. So far, there would seem to be no room for difference of opinion. But, having got thus far, we are not without help from the statute itself, as well as from previous legislation, as to the answers to be given to the questions thus open on the face of the section. Sect. 5 is as follows: “The local education authority shall throughout their area have the powers and duties of a school board and school attendance committee under the Elementary Education Acts, 1870 to 1900, and any other Acts, including local Acts, and shall also be responsible for and have the control of all secular instruction in public elementary schools not provided by them; and school boards and school attendance committees shall be abolished.” “Control of” as well as “responsibility for” secular instruction is thus, in terms, given to the local education authority in respect of non-provided schools, just as they acquire it by being substituted for the school board in respect of provided schools. Is there anything, then, elsewhere in the Act to rebut the *prima facie* presumption thus raised resting on the maxim “*expressio unius*”? On the contrary, we find again in s. 7, sub-s. 1 (a): “The managers of the school shall carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds; and, if the managers fail to carry out any such direction, the local education

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authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers ; but no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours." And sub-s. 6 : " Religious instruction given in a public elementary school not provided by the local education authority shall, as regards its character, be in accordance with the provisions (if any) of the trust deed relating thereto, and shall be under the control of the managers." It is quite clear, therefore, that control of religious instruction is expressly vested elsewhere than in the local authority in the case of non-provided schools, and on the prima facie construction of s. 7 above pointed out, control being negatived, the obligation to maintain is equally inapplicable. But it so happens that, apart from the considerations I have just pointed out, there is in the earlier legislation a key to the meaning of the words " maintain and keep efficient " on which the whole position of the respondents rests. The words are taken from s. 18 of the Act of 1870, which is still (subject to a slight modification) unrepealed : " The school board shall maintain and keep efficient every school provided by such board." Now it can be shewn to demonstration that in that section " efficient " meant that the school should be kept up to such a standard as would entitle it to claim the parliamentary grant. Sect. 97 enacts : " The conditions required to be fulfilled by an elementary school in order to obtain an annual parliamentary grant shall be those contained in the minutes of the Education Department in force for the time being, and shall amongst other matters provide that . . . (1) such grant shall not be made in respect of any instruction in religious subjects . . . but such conditions shall not require that the school shall be in connection with a religious denomination, or that religious instruction shall be given in the school, and shall not give any preference or advantage to any school on the ground that it is or is not provided by a school board." Thus it appears that religious instruction, so far from being a condition of efficiency for a parliamentary grant, was expressly excluded from being the subject of such a grant. Furthermore, as appears by the

minutes of the Education Department, commonly called "the Code," the standard of efficiency was ascertained by the reports of inspectors under the Board, no part of whose duty it was "to inquire into any instruction in religious subjects given at such school or to examine any scholar therein in religious knowledge or in any religious subject or book": Act of 1870, s. 7, sub-s. 3. The words, therefore, "maintain and keep efficient" in their original place in this legislation did not embrace religious instruction, and, being chosen in the later Act to define the obligation of the new authority, ought, it seems to me, to be construed in the same sense, unless there is something in the later Act to negative it. But nothing was pointed out to us that, in my judgment, sufficed to found any such inference. On the contrary, the erection of another authority who should have the control of religious instruction, and the fact that the express responsibility for and control of secular instruction is conferred on the local authority, seem to emphasize the propriety of reading the words in the same sense as in the earlier Act and as equally limited to secular instruction. Furthermore, the use of the words "public elementary schools" as the object of the duty founds another argument for the same contention. The definition and description of such a school in ss. 3 and 7 of the Act of 1870, coupled with s. 14 of that Act, exclude the teaching there of any "catechism or religious formulary which is distinctive of any particular denomination," and the mandate of s. 7 of the Act of 1902 is made applicable to such a school only. It is true that special provisions are contained in the Act permitting special religious instruction in such schools by persons not controlled by the local authority and prescribing the character of such instruction, but the definition of "public elementary school" remains unaltered, and it is to schools so defined that the mandate refers. The method of legislation adopted seems to be to legislate for the two classes of schools *uno flatu* so far as they can be brought under one category and to make special provisions where they differ. The schools as to which the common duty is imposed by s. 7 were, therefore, only those that could be brought under the words "public elementary schools," and the fact that this duty

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was to be applicable to non-provided schools only so long as these latter complied with certain new conditions would not seem to be treated as taking them out of the definition, or as enlarging in their case the obligation which is imposed equally in respect of both. The Attorney-General admitted, as he was bound to do, that a mandamus would not lie to compel the local education authority to provide and pay for religious instruction in a provided school. But the mandatory words apply equally to both classes of schools. Surely it is reasonable that the standard of efficiency to which both are to be alike kept should be the same and that in each case the duty should be commensurate with the control. This much certainly is involved in the admission of the Attorney-General, that the words "maintain and keep efficient" do not, of themselves, involve compulsion to provide religious instruction. In order, therefore, to reach the inference of compulsion in this respect, words must be found elsewhere making religious instruction not merely permissive, but compulsory in non-provided schools. But the words which deal specifically with religious instruction are to be found in s. 7, sub-s. 6, above cited, and are, as to the giving, permissive only; as to the character, if given, compulsory. A mandamus, therefore, ought not to lie in the case of one class of school any more than in the other. The construction contended for by the Crown seems to me to involve so many anomalies as to make its acceptance impossible. To begin with, it involves the imposition of two different standards of efficiency by the use of the same words. It involves the use of the words "public elementary school" in two different senses, as in the one case excluding and in the other case including denominational religious instruction, and this although the statutory definition of the term as excluding such instruction remains unchanged. It imposes obligation to maintain the efficiency of such instruction, while it expressly deprives the persons upon whom this obligation is imposed of any control over the subject-matter, or means of informing themselves of its condition. Confine the obligation imposed to the subject-matter to which it is in terms made applicable, viz., public elementary schools as defined by the Act, and all these difficulties vanish. On the other hand, the

difficulties involved in the appellants' construction are quite insignificant in comparison. They, in fact, resolve themselves into one which I have already touched upon, viz., that while it is essential to their position that "public elementary school" should be interpreted according to its definition as not involving denominational religious instruction, there is in s. 7, sub-s. 6 of the Act of 1902 a provision that religious instruction given in a public elementary school shall, as regards its character, be in accordance with the provisions of the trust deed. But unless this be taken as altering the definition of public elementary school, as to which the duty of the first part of the section is imposed, there is no logical difficulty. As I have already pointed out, the section itself does not treat this provision as altering the definition; on the contrary, it is apparently treated only as one of the conditions and provisions enumerated in the following sub-sections, during the observance of which the expenditure referred to in the section is to be made in the case of non-provided schools. That expenditure is in terms that which is required "for the purpose" of maintaining and keeping efficient all public elementary schools, and must be treated as referring to schools conforming to the statutory definition which the section does not purport to alter. The net result would seem to be that the obligation to maintain and keep efficient was extended only to the common element in the two classes of schools. I am of opinion, therefore, that this difficulty does not outweigh those which I have pointed out in the opposing contention. With the greatest respect to the opinion of the learned judges below, one of whom seems to have felt serious misgivings, I cannot get out of these obscure and difficult sections anything like a clear imposition on the appellants of the duty to provide and pay for denominational religious instruction in non-provided schools. It certainly ought not, in my opinion, to be inferred from the fact, if it be the fact, that there is no one else on whom this liability is imposed, an argument which seems to have had much weight with one of the learned judges below. It is clear that the Legislature regarded the non-provided schools as having funds derived from some other source: see s. 7, sub-s. 1 (d); and it is, as it seems to me, quite consistent

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with the intention of Parliament as expressed in the statute that while religious instruction might be given in non-provided schools, and if given should, in character, be in accordance with the provisions (if any) of the trust deeds, the liability to pay for it, if given, should rest with those in whom the statute vested the control out of such funds as might be at their disposal. It must be remembered that the teachers in the case of non-provided schools are appointed by the managers, and no privity is created between them and the local authority. But, even if nobody else is liable, it has still to be made out that the local authority are. Both sides sought to refer to what passed in Parliament as supporting their respective contentions as to the meaning of the enactment, but such evidence was, of course, inadmissible, and we have confined ourselves, as we were bound to do, to an attempt to collect the meaning from the language used. In my opinion the appeal must be allowed.

FLETCHER MOULTON L.J. read the following judgment :—

This is an appeal from an order of the King's Bench Division directing, at the instance of the Board of Education, the issue of a writ of mandamus to the county council of the West Riding of Yorkshire ordering that the said county council should pay certain sums specified in the schedule of the order to persons who were at the time teachers in non-provided schools within the jurisdiction of the county council as local education authority. These sums are portions of the salaries of those teachers which the county council consider fairly to represent the portions attributable to the work done by them in religious instruction in the schools, and the proceeding was instituted to raise, and does raise, the important question as to whether the local education authority are authorized or bound to pay out of public funds the cost of religious instruction in non-provided schools within their district. It is therefore not necessary to enter in detail into the facts that have raised this issue, because neither party has sought to raise any subordinate points based on those facts. On the one hand, the Board of Education admits that its claim is based on the duty which, as it alleges, is imposed upon the local education authority by the Education Act of 1902 to defray the

cost of this religious instruction, and it makes no complaint of the action of the county council if this view be wrong. On the other hand, the county council admits that the mandamus must go if such a duty is imposed upon them by that Act; but they contend that on the proper interpretation of the Act their duty and their powers with regard to defraying the expenses of non-provided schools are limited to such portion of the total expenses as is attributable to the secular education given in those schools. The King's Bench Division held that the view taken by the Board of Education was correct, and directed that the mandamus should issue. From this decision the county council appeals.

The arguments for the appellants are very formidable. The only provision in the Education Act, 1902, which imposes on the local education authority the duty of paying the expenses of non-provided schools is to be found in the opening words of s. 7, which enact that they shall "Maintain and keep efficient all public elementary schools within their area which are necessary." It will be seen that the subject-matter to which the two duties of (1.) maintaining and (2.) keeping efficient apply is one and the same, so that the obligation to maintain is no wider than the obligation to keep efficient; and if we hold that it is the duty of a local education authority to maintain a non-provided school in respect of the religious education given therein, we must hold that it is their duty to keep that religious education efficient. But it is very difficult to suppose that this Act intended to impose any public duty or obligation on local education authorities with regard to the efficiency of the religious instruction in non-provided schools within their areas. In the first place their responsibility as imposed by s. 5 of the Act is strictly confined to the secular education in non-provided schools, and it is control over secular education alone in those schools which is given to them by that section. In the next place the provisions of the Act are carefully framed so as to prevent the local education authority having any direct power of management or interference with religious instruction in the non-provided schools; and it seems improbable that the Legislature should have imposed on these public authorities the duty of keeping that efficient which they have not power to interfere with, manage,

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and control. Nor is it any answer to say that the words I have quoted from s. 7 must include religious instruction in the non-provided schools, because local education authorities have certainly the power to maintain and pay for Cowper-Temple instruction in the schools provided by them, and, in fact, habitually do so. In considering the powers and duties of local education authorities with regard to schools provided by them it is not necessary to call in aid s. 7, because s. 5, by giving to such authorities all the powers and duties of school boards, has given them ample power to do all that is required for the maintenance of Cowper-Temple instruction, including the power to use money derived from the rates for that purpose, seeing that all this came within the powers conferred on school boards by the Education Act of 1870.

These are not the only difficulties which arise from interpreting the language of s. 7 in such a sense as to include the religious instruction given in a non-provided school as part of the work of a public elementary school considered from the point of view of the responsibilities of the local educational authority. By sub-s. 4 of s. 7 one of the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant is that it is maintained under and complies with the provisions of that section. One of those provisions (which is set out in sub-s. 6) is that "religious instruction given in a public elementary school not provided by the local education authority shall, as regards its character, be in accordance with the provisions (if any) of the trust deed relating thereto." It follows, therefore, that if religious instruction in a non-provided school is not in accordance with the trust deed it does not comply with the provisions of sub-s. 6, and therefore the school is no longer entitled to a parliamentary grant. This deprives the school of the right to receive any contribution from the rates, because by the operation of s. 7 of the Act of 1870 it ceases to come within the definition of a public elementary school, and therefore ceases to be a school entitled to rate aid. In other words, the powers and duties of the local education authority to give rate aid to a non-provided school depend on the issue of fact as to whether the religious instruction given

therein is or is not in accordance with the trust deed. If this be so, it is not only permissible for local authorities to take cognizance of and examine the religious instruction given in a non-provided school, but obligatory on them so to do in order to ascertain whether they are justified in making contributions out of the rates to the expenses of the school. A further consequence, of a somewhat far-reaching character, follows from the bearing of this interpretation of the duties of local education authorities upon the provisions as to endowments which are to be found in s. 13 of the Act of 1902. If religious instruction is one of the purposes of a public elementary school for which provision has to be made by the local education authority (by which is clearly meant provision in a financial sense, since the section is dealing with the appropriation of funds), all endowments of non-provided schools which were originally given for the purpose of specific religious instruction must be handed over to the local education authority so as to go in aid of the rates.

Counsel for the appellants pressed upon the Court with great force that the solution of these difficulties lay in treating the religious instruction in a non-provided school as something outside its existence as a "public elementary school," and as something, therefore, with which the local education authority had no concern; that they were not responsible for its efficiency and had no duty to maintain it. I think there can be no doubt that if we could read the phrase "public elementary school" in s. 7 as referring to the school only so far as the secular education given in it is concerned, the difficulties to which I have referred would disappear. On the one hand the local education authority would have the duty to keep efficient only that of which they have the complete control, and for which they have the direct responsibility, and, on the other hand, the parliamentary grant and the rate aid would not be dependent on the nature of the religious education given in the non-provided schools, or even on its being there given at all, and the endowments which non-provided schools may possess for the purpose of specific religious instruction would remain in the hands of their managers. Nor can I see any other way of escape from the difficulties upon which I have dwelt. If "public elementary school" as used in s. 7 of

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the Act of 1902 connotes such a school regarded as carrying out the whole of its actual curriculum, including religious instruction, the language of the section is express that the school is to be maintained—that is, the entirety of its expenses paid by the local education authority. The question, therefore, which we have to decide is whether the phrase “public elementary school” can be so interpreted.

In my opinion it is impossible to construe the phrase “public elementary school” in s. 7 otherwise than as including the school throughout the whole of its work, including the religious instruction given therein. It is clear from s. 7, sub-s. 1 (a), that it is intended that this religious instruction should be given during school hours, which raises a strong *prima facie* case for the view that it was intended to be part of the school work. But there are still more direct indications of this. The religious instruction is specifically described as being given “in” the school. One instance of this is to be found in sub-s. 1 (c), which provides that “the consent of the authority shall also be required to the dismissal of a teacher unless the dismissal be on grounds connected with the giving of religious instruction in the school.” This is emphasized by sub-s. 6, which says that “religious instruction given in a public elementary school not provided by the local education authority shall, as regards its character, be in accordance with the provisions (if any) of the trust deed relating thereto, and shall be under the control of the managers.” Comparing this with the express provision in s. 5 that the local education authority shall “have the control of all secular instruction in public elementary schools not provided by them” leads one irresistibly to the conclusion that the secular instruction and the religious instruction given in non-provided schools are considered each of them as part of the work of the school and as together making up the whole work of that school. This is confirmed by considering together s. 7, sub-s. 1 (a), which indicates the duties of the managers of non-provided schools with regard to the “secular instruction to be given in the school,” and sub-s. 6, which indicates their duties as to the “religious instruction given in a public elementary school not provided by the local education authority.” Once more we find the two components

equally recognized as part of the instruction given in the school. Nor can it be said, as was contended, that a distinction is drawn in this respect between a "public elementary school" and a "school" generally. Sub-s. 6 speaks specifically of the "religious education given in a public elementary school not provided by the local education authority." It is true that in clauses (a) to (e) of sub-s. 1 the single word "school" is used, but no argument in favour of the appellants can be based on this because, on referring back it will be seen that these clauses deal with the conditions under which a non-provided school is entitled to be maintained by the local education authority by reason of its coming within the description of "public elementary schools," to which alone that privilege is accorded. Sect. 7 of the Education Act, 1870, which is still unrepealed, and which still serves as the clause defining a "public elementary school," speaks of "instruction in religious subjects in the school" and "instruction in religious subjects given at such school." All schools receiving parliamentary grants since March, 1871, both before and after the passing of the Act of 1902 were and must have been public elementary schools, because s. 96 of the Act of 1870, which is still unrepealed, permits such grants to be given only to "public elementary schools." To sum up, I may say that nowhere in the Act of 1902 or elsewhere can I find any suggestion that non-provided schools in receipt of parliamentary or rate aid are regarded as other than "public elementary schools," or that any portion of the instruction given in them is regarded as lying outside their work as such.

Having got thus far, and having determined that the religious and the secular instruction in non-provided schools are regarded by the Act of 1902 as being alike parts of the work of such schools as public elementary schools, it is, in my opinion, impossible to help coming to the conclusion that the cost of each of these component parts of the total school work forms part of the expenditure which must be provided by the local education authority, which by s. 7, sub-s. 1, is bound to maintain the school. This brings me to that which I consider to be the dominant consideration in the decision of this question. It may be said that, after all, the points to which I have called attention

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as making in favour of the respondents only constitute so many difficulties in the way of accepting the construction contended for by the appellants, and that they must be weighed against, and should be held to be outweighed by, the difficulties on the other side. But in my opinion the two sets of difficulties are of a different type. The Courts often have to consider statutes in their application to exceptional cases, to combination of circumstances rarely occurring, or to cases which, though the Courts may hold them to lie within the ambit of the statute, are yet distant from its main purpose. In such cases the Court is guided greatly by what it considers to be reasonable implications from the language of the statute, so that it to some degree judges of the intentions of the Legislature by what it considers to be reasonably deducible from the specific provisions. It is not greatly hampered in so doing in such a case by the fact that the words in the Act are not specially apt to describe its operation or its effect in the case before it, or that these could be much more clearly or more happily described otherwise. The reason is obvious. By hypothesis that particular case was probably not before the mind of the Legislature in framing the statute. Its peculiarities did not determine the choice of the language used. The intention of the Legislature will be most safely ascertained by determining the meaning and effect of the statute from a consideration of its language in the light of that to which it was primarily intended to apply, and, when they have thus been determined, its bearing on more remote matters will follow from them. But the case is widely different when the Court is dealing with the very subject-matter of the enactment—the general and typical case of that which it was intended to affect. Then the actual choice of language, and the question whether it is apt, or likely to be chosen to express a particular meaning in relation to that case, must be considerations of the highest importance, for the language used was presumably chosen with direct reference to the case before the Court. The words and the silence of the statute may then be almost equally eloquent; the absence of provisions which would naturally be inserted may be most significant. And in proportion as the exact form and phraseology of the enactment thus grow in

importance the question of the reasonableness of the interpretation arrived at diminishes in value as a guide. The Court is dealing with the very substance of the legislation itself, and there is no presumption that this will be such as the Court will deem reasonable. If I may use such an expression, it is a case of direct interpretation of language which must have been used consciously with regard to the case before the Court, and not of implication from language primarily used with regard to other matters.

In the present case the object of the Act of 1902 was to render non-provided schools rate supported. Up to that time the provided schools had alone been so. The characteristic of the non-provided schools was the denominational character of the religious instruction given in them, and it is evident that the Act intended to preserve this characteristic in spite of the fact that they were to be rate-supported. The continuation of the religious instruction was specifically provided for, and its cost must have been looked upon as a continuing expense of the school. Under those circumstances the question whether the whole expenses of the school or only part of them were to come out of public money must have been continually present to the mind of the Legislature in framing the Act. Under the system of rate aid the actual debit balance of the expenditure of the school is to be entirely defrayed out of the rates, and the Legislature must have intended to determine one way or the other whether that expenditure should or should not exclude the part due to religious instruction. It could not possibly be a *casus omissus*. To which of these two alternatives do the language and the nature of the provisions point? The consideration of the very case before us is sufficient, in my opinion, to decide the question. According to the contention of the appellants, the expenditure on religious instruction is to be separated from the general expenditure of the school, and is to be defrayed from a separate source. But it is clearly contemplated by the Act that this religious instruction may be given by the staff of the school in the school buildings and in school time. It must, therefore, be separated out of a common total of expenses by some subsequent procedure. Such a duty to separate the expenditure on secular from that on religious instruction did not exist in any

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public elementary schools prior to the passing of the Act. In the board schools all the education was alike paid out of the parliamentary grant and the rates. In the so-called voluntary schools the parliamentary grant was paid to the general account and applied as the managers thought fit. The appellants must, therefore, contend that this new system of apportionment of expenditure was introduced for the first time by the Legislature in an Act which certainly contains no direct reference to its introduction, and no provision how the apportionment should be made. If this apportionment would be necessary only in isolated cases the absence of any provision, how or by whom it should be made, would trouble me very little. The Courts have supplied more serious omissions in statutes by calling in aid doctrines such as that of quantum meruit or the like. But this is an apportionment which the Legislature must have contemplated as necessary in every provided school, and the question whether and, if so, how it was to be made must have been continually present to their minds. They could not have forgotten it or passed it over inadvertently, and therefore the absence of all such provisions is, in my opinion, conclusive that no apportionment was intended. It will be seen that in some minor matters apportionment was unquestionably contemplated, and with regard to these such provisions are to be found. Sect. 7, sub-s. 1 (d), and sub-s. 2 of the Act of 1902 deal with, comparatively speaking, minutiae, yet the provisions are most precise, and the Board of Education is appointed to decide disputes as to them. For example, the local education authority have to make good the damage done to the school-house by fair wear and tear in its use for the purposes of a public elementary school, which must, I think, mean during school hours. The use out of school hours is duly provided for by sub-s. 2, which also provides for the still smaller counter-charge for the use of the school furniture out of school hours by the managers. And yet in all this detailed Code there is no reference to the many times greater counter-charge which the appellants allege was intended to be made in every case for the use for the purposes of religious instruction, not only of the school-house, but of the major part, if not the whole, of the teaching staff. Then as to the

funds to be provided by the managers of non-provided schools. There is plain direction that they shall provide the school-house and funds for its maintenance. There is not a word as to their providing the cost of the religious instruction. This silence in respect of matters which, if the contention of the appellants be correct, must be of vital importance in the future conduct of the non-provided schools, and which must be of universal and everyday application, combined with the presence of specific provisions for maintaining and keeping efficient all public elementary schools simpliciter, and without any qualification, leaves no doubt in my mind that the cost of the religious instruction was intended to be borne by the rates in all cases.

If now we turn to the difficulties in the way of this interpretation to which I have already referred we shall find that they relate to the substance of the legislation and not to the construction of the Act. To make a public body keep efficient that over which it has not full control is not only unprecedented, but will strike, and has struck, many minds as unreasonable. But, as I have said, there is no canon of interpretation which authorizes a Court to assume that legislation must be in accordance with what it may consider reasonable. The Legislature chooses what it shall do—we have only to accept that choice and enforce it. It may be startling to find that a deviation from the provisions of the trust deed in the character of the religious education given in a non-provided school should make it forfeit the right to any aid from public funds, but if the Legislature were determined at all costs to maintain the specific character of such instruction it was a perfectly efficient way of doing so. Similarly, if the Legislature were determined that the support given to a non-provided school from the rates should be adequate for the whole of its curriculum, the object was attained by making it the duty of the local education authority to keep the whole school efficient, whether they had absolute power of doing so or not. Such an enactment would at least authorize and require them to provide adequate funds for the purpose; and it may have been thought that the denominational managers might safely be trusted to keep efficient this part of the education, so long as it was at the public cost. However this may be, the duty of the Court is

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clear. It has nothing to do with the reasons which moved the Legislature when it has once ascertained what the Legislature have in fact done. All we are concerned with is the true meaning of the statute, and to arrive at that we are bound to weigh impartially all the indications the Legislature have given of their intention. It is by doing so, to the best of my power, that I have come to the conclusion that we ought not to do what the appellants in substance ask us to do here, namely, to give to the words "school" and "public elementary school" varying and unusual meanings not derived from the Act itself, so as to introduce for the first time the principle of a division or apportionment of the total expenditure of a school into that which relates to the religious and that which relates to the secular instruction given therein, and an accompanying power and duty in the local education authority to require that such apportionments should be made in every case, and to limit their contributions accordingly—all which matters are passed over in silence in the Act, although they are in their nature such that, had they been intended by the Legislature, they would inevitably have stood in the very forefront of the enactment. I am, therefore, of opinion that the judgment of the Court below was correct and should be affirmed; but as my brothers are of a contrary opinion, the appeal will be allowed.

FARWELL L.J. read the following judgment :—

The short point that we have to determine on this appeal is whether a local education authority under the Act of 1902 is bound to provide funds for religious or denominational instruction.

The Act of 1870 established a compulsory system of secular elementary education in England and Wales by dividing the country up into districts and ascertaining whether there were sufficient elementary schools in each district to provide that district with such education. If no voluntary schools or no sufficient and efficient voluntary schools already existed in any district, school boards were set up and board schools opened therein; but no board school was established in a district so long as voluntary schools therein remained sufficient and efficient. Efficiency was tested by inspection and examination by Her

Majesty's inspectors of schools, and was rewarded by parliamentary grants. No religious education was compulsory; but in board schools it was permissible to give undenominational religious education; but such education was submitted to no test of efficiency, and could not be rewarded by any parliamentary grant. In voluntary schools, so long as the secular education was efficiently given, and no part of any parliamentary grant was applied towards payment for religious teaching, the managers were free to give such religious instruction as they thought fit; but, again, the State allowed no test of the efficiency of such instruction by Her Majesty's inspectors, although the managers were permitted to appoint inspectors of their own for the purpose under s. 76. The expenses of the school boards were provided for by s. 53; voluntary schools were left to rely on endowments and subscriptions, with such aid from parliamentary grants as they could earn by secular efficiency. As time went on, and the expenses of education increased, the burden of maintaining voluntary schools became heavier, owing to the increasing requirements of the education authorities with respect to buildings, accommodation for children, salaries of teachers, and the like; but there was not, so far as I am aware, any appreciable increase due to the requirements of religious instruction. Under these circumstances the Act of 1902 was passed "to make further provision with respect to education in England and Wales," and this Act and the Act of 1870, so far as unrepealed, must be read together. There has been considerable divergence of judicial opinion as to the use, if any, that may be made of the title in considering the meaning of an Act (see the cases collected in Maxwell on Statutes, 3rd ed. pp. 56 to 58); but it is unnecessary to consider the point, because the title is quite colourless. "Further provision with respect to education" may refer equally well to improving existing secular education or to adding religious education to it. By s. 1 a new local education authority was created, whose duties and powers are defined by s. 5. This section is, to my mind, the keynote of the Act. It is clear that it imposes no duty on the new authority in respect of religious education. As already stated, board schools had no such duty, and the responsibility

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and control of the local education authority for and of non-provided schools is expressly limited to secular education. By s. 6 provision is made for the management of schools by managers appointed in different modes, according to whether the school be provided or not provided by the local education authority. Sect. 7 provides that "the local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose." "Public elementary schools" are defined by s. 7 of the Act of 1870, and this section is not repealed, and the expression must have the same meaning in both Acts. The essential attributes of the public elementary school may be paraphrased shortly thus: No religious tests are allowed; no religious teaching is compulsory; and no religious teaching (whether it be under the Cowper-Temple clause in board schools or denominational in voluntary schools) is submitted to the test of inspection by His Majesty's inspectors, or can be paid for out of any parliamentary grant. The Attorney-General contends that the words in this section extend to all non-provided schools which satisfy the requirements of s. 7 of the Act of 1870 in respect of all religious instruction that the managers of such schools may think fit to give, with the result that the local education authority must keep efficient and provide money for and control its expenditure on a subject over the teaching of which they have no control, and the efficiency of which teaching they have no means of testing; and they must provide money to such an amount as the managers may require, subject only to such control as may be exercised by the Board of Education under s. 16 of the Act of 1902. Such a construction would be inconsistent with the principles on which Acts of Parliament are usually construed. It is well settled that, if a jurisdiction be conferred or a duty imposed by statute on a public body, there is created by necessary implication the power to do all such acts and to make all such payments as are essential for the exercise of such jurisdiction or the discharge of such duty. When, therefore, a general phrase is used which is ambiguous, and may create a duty to keep efficient secular and religious education, or

the former only, and express provision is made for testing the efficiency of the secular and none for that of the religious, and not only that, but the provision for testing the secular is expressly forbidden in the case of the religious, it is, in my opinion, impossible to construe the ambiguous phrase in such a way as to create a duty. It is a necessary corollary to the proposition stated above that ambiguous words in an Act of Parliament ought not to be construed as imposing a duty on a public body unless the Act provides means, either expressly or by implication, for the due performance of such duty. I should be of this opinion if s. 7 stood alone, but I think that s. 5 and s. 7 must be read together, and that when so read the meaning is reasonably clear; s. 5 creates a duty: s. 7 imposes its obligation to discharge such duty financially and otherwise. Omitting the reference to provided schools as irrelevant for this purpose, the sections run thus: The local education authority shall be responsible for and have the control of all secular education in non-provided public elementary schools, and shall maintain and keep efficient such schools as public elementary schools, and have the control of all expenditure required for that purpose. The responsibility and control are thus made co-extensive with the maintenance and efficiency and the expenditure required thereon, and the local education authority have not cast upon them a duty to keep efficient in religious instruction with no means of performing such duty; for it has not been, and could not be, I think, contended that sub-s. 1 (b) of s. 7 does more than give a right of entry on the school.

Further, it is plain, at any rate, that the duty to keep efficient and the control of expenditure for that purpose are absolutely co-extensive. If the local education authority are bound to find the money for religious education, they are equally bound to control its expenditure in such a way that the religious education given is efficient; they cannot call in the aid of His Majesty's inspectors of schools, they must, therefore, themselves take proper steps to test its efficiency. No machinery for applying such a test is suggested in the Act. If there is a trust deed the provisions of the trust deed have to be regarded; but in all other cases the managers control the religious education. It appears

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to me impossible that the Legislature should have intended (to take a possible instance) that a local education authority consisting solely of dissenters should test the efficiency of the religious teaching in a Roman Catholic school, or vice versa. It would be worse than cynical to compel any body of serious men to see to the efficient teaching of religious tenets which they honestly regard as heretical.

The case is rendered more clear by reference to s. 97 of the Act of 1870. The first condition there to which I am about to refer is clearly a substantive enactment, and not left to the option of the Board of Education, and that section itself is referred to in s. 10 of the Act of 1902, so that it was under the immediate attention of the Legislature during the passing of the Act. If this s. 97 is read into s. 7 of the Act of 1902 as sub-s. 4 (a) it will run thus: Sub-s. 4—"One of the conditions required to be fulfilled by an elementary school in order to obtain a parliamentary grant shall be that it is maintained under and complies with the provisions of this section." Sub-s. 4 (a)—"Such grant shall not be made in respect of any instruction in religious subjects." But the funds provided under s. 10 are parliamentary grants. These are included in the receipts out of which the local education authority have to make the payments required for the fulfilment of their duties under the Act. No provision is made for any division or apportionment of such receipts, nor is there any conceivable reason why any difference in this respect should be made between taxes and rates. If the Legislature recognizes the principle as sound and just that no parliamentary grant should be made towards denominational religious teaching, as it has done and still does (see ss. 96 and 97 of the Act of 1870, which are both unrepealed), how can the Court assume that it intended not to apply the same principle to rates made for educational purposes under the authority of Parliament?

Again, s. 13 of the Act of 1902 appears to me to confirm this view. Sect. 13, sub-s. 1, is—"Nothing in this Act shall affect any endowment, or the discretion of any trustees in respect thereof: Provided that, where, under the trusts or other provisions affecting any endowment, the income thereof must be applied in whole or in part for those purposes of a public

elementary school for which provision is to be made by the local education authority, the whole of the income or the part thereof, as the case may be, shall be paid to that authority ; and, in case part only of such income must be so applied, and there is no provision under the said trusts or provisions for determining the amount which represents that part, that amount shall be determined, in case of difference between the parties concerned, by the Board of Education. . . .” Then sub-s. 2 provides that “ Any money arising from an endowment, and paid to a county council for those purposes of a public elementary school for which provision is to be made by the council, shall be credited by the council in aid of the rate levied for the purposes of this Part of this Act in the parish or parishes which, in the opinion of the council, are served by the school for the purposes of which the sum is paid, or, if the council so direct, shall be paid to the overseers of the parish or parishes in the proportions directed by the council, and applied by the overseers in aid of the poor-rate levied in the parish.” I think it is plain that the words “ For those purposes of a public elementary school for which provision is to be made by” the local education authority are equivalent to “secular purposes.” The income attributable thereto must be credited or paid to the overseers of the parish served by the school in aid of the poor-rate. No discretion is given to the county council ; but any part applicable for religious purposes is left untouched and remains so applicable in the hands of the trustees. If the local education authority were liable to find the money to pay for religious education, such money would, surely, have been made payable to them ; but the rates levied are treated as levied for secular purposes only, and accordingly the amount only of the trust income applicable for secular purposes is paid or credited to the ratepayers.

I can see nothing in s. 18 or in the schedules applicable thereto that militates against the opinion I have expressed ; nor do I think s. 7, sub-s. 6, contains anything contrary. It simply treats religious teaching as it was before the Act, and was intended to remain, as optional, and applies to the state of circumstances when the option is exercised.

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It was suggested that the view taken by us of the Act is not in accordance with the intention of the House of Commons or with public understanding of the effect of the Act; and reference was attempted to be made to the debates and to passive resisters; but we have only to deal with the construction of the Act as printed and published. That is the final word of the Legislature as a whole, and the antecedent debates and subsequent statements of opinion or belief are not admissible. But they would be quite untrustworthy in any case. In the case of an Act dealing with a controversial subject ambiguous phrases are often used designedly, each side hoping to have thereby expressed its own view, and the belief of each that it has succeeded is more often due to the wish than to any effort of reason. The generality of public understanding is quite incapable of proof, and is beside the mark unless as an appeal to timidity. “*Securus judicat orbis terrarum.*” The principles of construction applicable to Acts of Parliament are well settled, and will be found stated in *Stradling v. Morgan* (1), which has received the approval of Turner L.J. in *Hawkins v. Gathercole* (2), and of Lord Halsbury in *Eastman Photographic Materials Co. v. Comptroller-General of Patents* (3), and do not admit of any such considerations. The Court must, of course, in construing an Act of Parliament, as in construing a deed or will, do its best to put itself in the position of the authors of the words to be interpreted at the time when such words were written or otherwise became effectual; but this will no more justify us in admitting, as evidence on the construction of an Act, speeches in either House or subsequent statements in the public papers, or elsewhere, of the effect of the Act than it would justify us in admitting on the construction of a will the advice given to the testator by his solicitor before, or the statements of himself or his expectant legatees of the effect of his will, after he had made it. The mischief sought to be cured by the Act and the aim and object of the Act must be sought in the Act itself. Although it may, perhaps, be legitimate to call history in aid to shew what facts existed to bring about a statute, the inferences to be drawn

(1) (1560) 1 Plowden, 204.

(2) (1855) 6 D. M. & G. 1.

(3) [1898] A. C. 571, at p. 575.

therefrom are extremely slight, as is pointed out by Bramwell B. in *Attorney-General v. Sillem*. (1) I think that the true rule is expressed with accuracy by Lord Langdale in giving the judgment of the Privy Council in the *Gorham Case* in Moore, 1852 edition, p. 462: "We must endeavour to attain for ourselves the true meaning of the language employed,"—in the Articles and Liturgy—"assisted only by the consideration of such external or historical facts as we may find necessary to enable us to understand the subject-matter to which the instruments relate, and the meaning of the words employed."

I agree with the Master of the Rolls that the appeal must be allowed.

*Appeal allowed.*

Solicitor for Board of Education: *The Solicitor for the Treasury*.

Solicitors for defendants: *Clements, Williams & Co., for Trevor C. Edwards, Wakefield*.

(1) (1863) 2 H. & C. 431, at p. 531.

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## MACBETH v. NORTH AND SOUTH WALES BANK.

June 27, 28,  
30; Aug. 8.

*Cheque—Forged Indorsement—Payee—"Fictitious Person"—Belief or Intention of Drawer—Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 7, sub-s. 3.*

W., by falsely representing to the plaintiff that he had agreed to purchase from K. certain shares then held by K. in a company, and that he had arranged to resell the shares at a profit, induced the plaintiff to agree to assist him in financing the transaction. For this purpose the plaintiff drew a cheque on the C. bank payable to K. or order for the amount of the purchase-money, which cheque was delivered to W. in order that he might hand it to K. in payment for the shares. W. forged K.'s indorsement to the cheque, and paid it into his own account with the defendant bank, who credited him with the amount, and collected the money from the C. bank. W. had not agreed to buy any shares from K., and K. had at the time no shares in the company. In an action by the plaintiff against the defendant bank for the conversion of the cheque:—

*Held*, that, as K. was an existing person designated by the plaintiff and intended by him to be the payee of the cheque, the payee was not a "fictitious person" within s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, and that the defendant bank was liable to pay to the plaintiff the amount of the cheque as damages for the conversion.

*Vinden v. Hughes*, [1905] 1 K. B. 795, approved and followed.

ACTION tried by Bray J. without a jury.

The plaintiff's claim was for damages for the conversion of a cheque or alternatively for money had and received to the plaintiff's use. The facts, which are stated at length in the judgment, may be summarized as follows: One White, by falsely representing to the plaintiff and his brother-in-law Irvine that he had agreed to buy from a man named Kerr 5000 shares in a company called White's Carriage Company at 2*l.* 5*s.* per share, and that he had arranged to resell the shares to a syndicate for 2*l.* 10*s.* per share, induced the plaintiff and Irvine to agree to assist him in financing the transaction. For the purpose of paying Kerr for the shares the plaintiff drew a cheque on the Clydesdale Bank for 11,250*l.*, payable to Kerr or order, which cheque was delivered by Irvine to White, in order that he might hand it to Kerr in exchange for the scrip and transfer of the shares. Instead of so doing White forged

Kerr's indorsement to the cheque and paid it into his own account with the defendant bank, who credited him with the amount and obtained payment of the cheque from the Clydesdale Bank. White had in fact never agreed to buy any shares from Kerr, and Kerr did not hold any shares in White's Carriage Company. Subsequently to receiving the cheque White sent to the plaintiff certificates for 5000 shares which he had obtained from the secretary to the company by producing forged transfers from Kerr. These certificates were deposited by the plaintiff with the Clydesdale Bank as security for an advance made by the bank for the purpose of the transaction. As soon as the plaintiff discovered that White had forged the indorsement to the cheque he repudiated the transaction and commenced this action.

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*Pickford, K.C., Horridge, K.C., and Leslie Scott, for the plaintiff.*

*Isaacs, K.C., and M. Hill (Hugh Beazley with them), for the defendants.* The facts shew that the plaintiff, Irvine, and White were partners in a joint transaction, and the money represented by the cheque was the property of all three. That money has been received from the defendants by one of the partners, no doubt in fraud of the other two, but the damages recoverable by the plaintiff, if any, can only be damages for the conversion of the paper on which the cheque was written, i.e., nominal damages. The plaintiff has in fact suffered no damage. He must give credit for the value of the shares which he has received. The certificates are good as against the company, and the value of the shares must be taken to be the price at which the parties agreed to buy them, viz., 11,250*l.* But the main point on which the defendants rely is that Kerr was a fictitious payee within s. 7, sub-s. 3, of the Bills of Exchange Act, 1882, and that the cheque must therefore be treated as payable to bearer. Kerr had not at the time any shares in the company nor had he agreed to sell any to White. Although he was a real person in the sense that he was alive, when regarded as a person who had agreed to sell 5000 shares for 11,250*l.*, he was entirely fictitious. He did not exist for the purpose for which his name was introduced into the transaction. Under no



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circumstances could he have set up a right to the cheque. A fictitious payee is not necessarily non-existent, for the section uses the words "fictitious or non-existing." According to the test laid down in *Bank of England v. Vagliano* (1), one must ascertain whether the person named was intended to have any rights to the cheque, or whether the name was inserted as a mere pretence: per Lords Watson and Herschell. (2) Here, although it may be said that the plaintiff intended the money to be paid to Kerr, he did not intend it to be paid to him if he was not a person who had agreed to sell the shares for the amount of the cheque. Kerr was most certainly named in pretence by White, who was the only person who could designate the payee. In *Vinden v. Hughes* (3), which will be relied on by the plaintiff, the facts are distinguishable, because some of the cheques were filled up after signature, and it was admitted that that made no difference. Further, that decision is not binding, because it is based upon a misapprehension of what was really decided in *Bank of England v. Vagliano*. (1) The defendants do not rely on s. 82 of the Act.

*Pickford, K.C.*, in reply. The suggestion as to partnership is unfounded. The plaintiff was making an advance, and it was never intended that the cheque or the proceeds should be the property of the three persons. As to the shares, the plaintiff has never accepted them with full knowledge of the facts, and it is doubtful whether he has any title to them. In any event, if he recovers in this action, he will not claim to retain the shares. With regard to the third point, *Vinden v. Hughes* (3) cannot be distinguished from the present case, and was rightly decided. As was pointed out by Lord Herschell in *Bank of England v. Vagliano* (1), the drawer is the person to designate the payee. In that case there was no drawer, and therefore the payee was necessarily fictitious; but here the plaintiff was the drawer, and Kerr was a real person whom the plaintiff intended to be the payee.

*Cur. adv. vult.*

(1) [1891], A. C. 107.

(2) [1891] A. C. at pp. 134, 152.

(3) [1905] 1 K. B. 795.

Aug. 8. BRAY J. read the following judgment:—In this case the plaintiff claims to recover from the defendants 11,250*l.* either as damages for the conversion by the defendants of a cheque drawn by him for that amount on the Clydesdale Bank and made payable to T. A. Kerr or order or as money had and received to his use, they having received that amount from the Clydesdale Bank as the proceeds of the cheque, or as being money which belonged to the plaintiff.

There is no doubt that, if the plaintiff can shew that the defendants did convert this cheque while it was his property and did receive the proceeds of it through a forged indorsement, *prima facie* the plaintiff can recover : see *Ogden v. Benas* (1) and *Arnold v. Cheque Bank.* (2) Mr. Isaacs, for the defendants, raises three points in answer.

First, he says the cheque, or at all events the money represented by it, was not the plaintiff's property when the conversion took place ; it was the property of the adventurers, viz., plaintiff, White, and Irvine. Secondly, he says that the plaintiff must give credit in reduction of damages for the value of the 5000 shares in White's Carriage Company which he received, and that the value of those shares must be taken at 11,250*l.*, so that the damages recoverable are nominal. Thirdly, he says that T. A. Kerr was a fictitious payee, and therefore the cheque was payable to bearer, so that the defendants obtained a good title to the cheque, and consequently did not convert it. In order to see if these defences can be maintained it is necessary to go with some detail into the facts. The plaintiff was a solicitor at Dunfermline, but was also local manager there of the local branch of the Clydesdale Bank. Irvine was his brother-in-law ; White was the managing director of a company called White's Carriage Company. Irvine and White had had several business transactions together, in some of which they had been assisted by the plaintiff ; and on December 19 they came to Dunfermline to see the plaintiff, and they invited him to join them in another transaction. At that interview White was spokesman. He stated that he had arranged to purchase 5000 preference shares in White's Carriage Company from a friend of his named Kerr, who formerly lived at Bootle, and

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(1) (1874) 9 C. P. 513.

(2) (1876) 1 C. P. D. 578.

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was then an engineer residing at Manchester, and that the price of the shares was 2*l.* 5*s.* per share, and that he had arranged to resell the shares at 2*l.* 10*s.* to a London syndicate, who were buying up carriage businesses in and around Liverpool; and he wished to know if plaintiff could arrange to finance the transaction. The agreement between the three was then written out at White's dictation. White and Irvine signed, but plaintiff did not, as he had first to arrange with his head office, i.e., the head office of the Clydesdale branch. It was arranged that he should draw bills to be accepted jointly and severally by White and Irvine and get them discounted by his bank. The plaintiff asked White how it was proposed to settle with Kerr and how the remittance was to be made; and White suggested that as the shares were being purchased from Kerr alone, plaintiff should make out the cheque, not in Irvine's name, as was to be done in the purchase of Rundle's business, but in the name of T. A. Kerr, so that the cheque might be handed to him in exchange for the scrip and signed transfer. The plaintiff stated that he adopted the suggestion of White's because the cheque was then bound to be indorsed by Kerr, i.e., would be an additional security to him that his money would be applied to the purchase of the shares. After the interview the following letters passed: Plaintiff to Irvine, dated December 19, 1905; Irvine to plaintiff, December 20, which enclosed two blank transfer forms to be signed by the plaintiff and returned for the 5000 shares; plaintiff to Irvine, December 21, enclosing two cheques, one of which was the cheque for 11,250*l.*, payable to T. A. Kerr, and the transfer forms signed; and Irvine to plaintiff, December 22. Plaintiff then signed the agreement, which had been previously signed by Irvine and White, adding the words, "signed subject to contents of letters of 19th and 20th December passing between myself and Irvine."

That agreement contained a stipulation that the plaintiff should advance 22,000*l.* (which included the 11,250*l.*) towards the purchase of the businesses and shares for which Irvine and White were to give acceptances as required, and it also provided that plaintiff, Irvine, and White should be jointly interested in the purchases of the businesses and shares, and should participate in equal shares in any risks or profits in the realization. The

bank is not mentioned in the agreement, but the letters shew that the way the plaintiff was intending to obtain the money to enable him to make the advance was through his bank, the Clydesdale Bank, and that that bank was going to discount the bills and place the proceeds to his credit. In my opinion the letters do not alter the written agreement on any point material to this dispute, but they shew how it was intended to be carried out, and that the plaintiff was to be entitled to deposit the shares with the bank as the security for the money they were placing at his disposal. The matter was carried out in the way that had been arranged. The cheque for 11,250*l.* was drawn by the plaintiff on his bank and made payable to T. A. Kerr, and was sent by him to Irvine for him or White to hand to Kerr in exchange for the scrip and transfer of the 5000 shares. Irvine handed the cheque to White for this purpose, but instead of using it for that purpose White forged an indorsement by Kerr, and paid it into his own account at the defendants' bank. White had never agreed to purchase any shares in White's Carriage Company from Kerr, nor had he negotiated with Kerr for any such purchases, and Kerr at that time held no shares in that company. White's statements to the plaintiff on that point were false and fraudulent representations, but the plaintiff believed them to be true and acted throughout with perfect bona fides. The defendants procured the presentation of the cheque to the Clydesdale Bank, and they received the 11,250*l.* I need not go into the details of what they did, because it is admitted by Mr. Isaacs that they cannot avail themselves of any protection given by s. 82 of the Bills of Exchange Act. If, when they received the proceeds, the cheque and the money it represented were the plaintiff's, the plaintiff is clearly entitled to recover. Now, was the cheque and the money it represented the property of the plaintiff? First, as to the cheque, it was given, as I have found, by the plaintiff to Irvine that he or White might hand it to Kerr. No property in the cheque was intended to be passed by the plaintiff to anyone but Kerr. White held it for the plaintiff until he handed it over to Kerr. Mr. Isaacs hardly disputed that the property in the cheque remained in the plaintiff, but he said the money it represented belonged to the

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three. Why? No doubt the plaintiff might have fulfilled his agreement to make the advances by giving the money to the partnership in order that they might pay it to Kerr, but he could equally fulfil his agreement by paying the money straight to Kerr, and I find on the evidence that the latter was the mode which he intended to adopt with the approval of the others. In fact, owing to what White did, the plaintiff never parted with the cheque or made the advance. His cheque was stolen by White before he could do so. The object of making the cheque payable to Kerr was that no one but Kerr should handle the money. The money at the bank was the plaintiff's money placed at his disposal by the bank. It never was the money of the partnership, and when the cheque was presented it was the plaintiff's money that was paid over to the defendants. It seems to me, therefore, the property in the cheque and the money it represented never left the plaintiff, and Mr. Isaacs' first point fails.

Now as to the shares. No doubt on January 23 or 24 certificates for 5000 preference shares in White's Carriage Company were received by plaintiff, and he took them believing that they were the shares which had been purchased from Kerr with his money, but they were not. They had not been bought by White from Kerr or anyone else. White had obtained them somehow or other; he had got the secretary to issue certificates which the company had no right to give, but the validity of which I will assume the company could not dispute, and he had induced the secretary to give these certificates partly by producing to him two forged transfers from Kerr, being the blank transfers signed by plaintiff to which Kerr's name as transferor had been forged. Now it may be that the plaintiff might have accepted these shares as a fulfilment of the arrangement, but he could not be bound by any such acceptance without knowledge of the facts. There has been no acceptance by him with knowledge. He repudiated the transaction on February 10 as soon as he learnt of the forged indorsement, and he commenced this action on February 19. If he had, after knowledge of the facts, insisted on a right to keep the shares, it might be that he would have ratified White's act in forging the indorsement to the cheque, but Mr. Isaacs does not, and could not, maintain that there was

any such ratification. The plaintiff then having repudiated the transaction, what is his position? He has never made the advance. He has no title to the shares. They belong to some other person. It may be doubtful who that person is, but whoever he be, that person is the person entitled to demand them, and the plaintiff must give them up. If a man agrees to buy goods to be made according to sample and pays in advance, and goods are delivered which he refuses to accept as not being according to sample, he cannot keep the goods and sue for money had and received. This is the position which, by his counsel, the plaintiff takes up. He does not claim to hold the shares. He has never received them in payment of the 11,250*l.*, nor, as the plea suggests, in satisfaction of any damages, and in my opinion he is clearly not bound to do so. The agreement between the three has never been carried out; the plaintiff has had a cheque worth 11,250*l.* stolen from him. It came into the hands of the defendants, who, unless they can shew that the payee was fictitious, converted it and received the proceeds, which they must restore in full. The second point therefore fails.

I come now to the third point, which, as Mr. Isaacs stated, was his main point. With reference to this, I have found the facts to be these. The plaintiff was told that Kerr was an engineer formerly living at Bootle, but then near Manchester. That was true. He was told that Kerr had agreed to sell the 5000 shares to White. That was untrue, and he in fact held no shares. There had been no such transaction, but the plaintiff believed the statements made to him, and made the cheque payable to Kerr in order that he and no one else should get the money. Can Kerr, under these circumstances, be said to be a fictitious payee? I will first examine the authorities. In *Vinden v. Hughes* (1); the facts were, in my opinion, indistinguishable from the present case. Vinden had a real person in his mind when he drew the cheque, although in fact the payee was not his creditor as he supposed, and had had no transaction with him giving rise to such a debt. He had been deceived by his clerk, but he intended the payee and no one else to receive the money. Warrington J. held that the payee was not fictitious. He

(1) [1905] 1 K. B. 795.

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says (1) : "It was not a mere pretence at the time he drew it. He had every reason to believe, and he did believe, that the cheques were being drawn in the ordinary course of business for the purpose of the money being paid to the persons whose names appeared on the face of those cheques." That seems to me to exactly fit the present case. Under ordinary circumstances I should consider myself bound by this decision, but it was pressed on me that Warrington J. had misread the judgments in the *Bank of England v. Vagliano*. (2) I think, therefore, I ought to examine these judgments. What were the facts of that case? There was no real drawer; the bills had been drawn by Vagliano's clerk Glyka to make Vagliano think that they were real bills drawn in the ordinary course of business by customers who were entitled to ask Vagliano to accept them. In truth, the whole bills were fictitious, though Vagliano believed them to be real and accepted them. It was strongly urged that, inasmuch as it was the obligations of the acceptor which were in question, the payees could not be fictitious unless they were so to his knowledge, and the Court of Appeal so held; but the House of Lords held the contrary. I think the real ground of their decision is to be found in Lord Herschell's judgment beginning near the bottom of p. 147. I have therefore to ask myself, is this the ordinary case where the payee designated in the bill "is a real person intended by the drawer to receive payment either by himself or by some transferee?" It seems to me that there can be but one answer to that question. Kerr was a real person intended by the plaintiff, the drawer, as I have found, to be the person who should receive payment. It is a fallacy to say that Kerr was fictitious because he had got no shares and had never agreed to sell any to White. The plaintiff believed he had, and intended him, and no one else, to receive the money. It seems to me that when there is a real drawer who has designated an existing person as the payee and intended that that person should be the payee, it is impossible that that payee can be fictitious. I think the word "fictitious" implies that the name has been inserted by the person who has put it in for some dishonest purpose, without any intention that

(1) [1905] 1 K. B. 802.

(2) [1891] A. C. 107.

the cheque should be paid to that person only, and therefore it is that such a drawer is not permitted to say what he did not intend, viz., that the cheque shall be paid to that person only, and the only way of effecting this is to say that it shall be payable to bearer. It matters not, in my opinion, how much the drawer of the cheque may have been deceived if he honestly intends that the cheque shall be paid to the person designated by him. I think Warrington J. has not in any way misread the judgments in *Bank of England v. Vagliano* (1). I think his decision and mine are really founded on the principles laid down in that case, and in the result therefore I am of opinion that the three contentions raised by Mr. Isaacs fail, and that the plaintiff is entitled to recover the whole 11,250*l.* The plaintiff contended that I ought to allow interest under the power conferred on me by the statute. I have already expressed the opinion that I ought not. The statute says: "may allow," not "must"; it is therefore intended that the tribunal shall have a discretion. No doubt the plaintiff has lost the value of the money for some months, but that is always the case in conversion. But the defendants have been guilty of no intentionally wrongful act; they are victims to the fraud of White. I cannot see that they have been benefited by the conversion of the cheque. If it had not been cashed they probably would not have allowed White to draw so much. Under the circumstances I cannot allow any interest by way of damages.

*Judgment for the plaintiff.*

Solicitors for plaintiff: *Weightman, Pedder & Weightman, Liverpool.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

(1) [1891] A. C. 107.



## [IN THE COURT OF APPEAL.]

C. A.

## DEVONALD v. ROSSER &amp; SONS.

1906

July 5, 6.

*Contract—Employer and Workman—Piece Work—Contract by Workman not to quit Employment without giving a Month's Notice—Inability of Employer to keep Works open except at a Loss—Implied Obligation to provide Workman with Work.*

The plaintiff was a workman employed by the defendants at their works upon the terms that he was to be paid by piece work, and that he should not quit or be discharged from the works without giving or receiving a month's notice. The defendants, finding that owing to the state of the trade they could not keep their works running at a profit, closed them, and subsequently gave the plaintiff a month's notice to quit. In an action to recover damages for breach of an implied agreement by the defendants to find the plaintiff work during the period between the closing of the works and the expiry of the notice :—

*Held*, that there was an implied undertaking by the defendants to provide the plaintiff with a reasonable amount of work so long as the employment lasted, the measure of what was reasonable being the average amount of the plaintiff's earnings previously to the stoppage of the works.

APPEAL from the judgment of Jelf J., after trial without a jury.

The plaintiff was employed as a rollerman at the defendants' Cilfrew tinplate works in South Wales. He had been in their regular employment for thirteen years since 1890, and was employed upon the terms of certain rules which were applicable to workmen in all departments of the defendants' works. By rule 1, "No person regularly employed shall quit or be discharged from these works without giving or receiving twenty-eight days' notice in writing, such notice to be given on the first Monday of any calendar month before 12 o'clock at noon." By rule 11, "Every workman in the various departments of the works will when required by the manager or agent perform such duties as may be deemed necessary in case of emergency other than the special work he may be engaged in." The plaintiff was paid by piece work at so much per box of 112 tinplates. In July, 1903, the defendants found that owing to the state of the trade they could not keep their works running at a profit, and on July 20 they closed the works. On August 3, 1903,

they gave the plaintiff notice under rule 1 to terminate his employment on August 31. The action was brought to recover damages for breach of an implied agreement by the defendants to provide him with work during the six weeks between July 20 and August 31. The defendants, by way of defence, contended as matter of law that as the plaintiff was employed on the terms of being paid for piecework there was no obligation upon them to find him work if they had none for him to do; and, in the alternative, they contended that it was a custom of the tinplate trade that the masters should be at liberty to close their works without notice in the event of lack of orders or specifications for orders at remunerative prices. The hearing of the action took place on May 24, 25, and 26, 1905.

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*S. T. Evans, K.C., and Meager, for the plaintiff.*

*Bankes, K.C., and W. D. Benson, for the defendants.*

On June 6, 1905, Jelf J. delivered the following written judgment:—

This is said to be a test case to settle an important question between masters and men in the tinplate trade of South Wales. The plaintiff was a rollerman in the employment of the defendants at their Cilfrew tinplate works, and he brought this action in substance to recover 16*l.* 10*s.* as damages for breach by the defendants of an alleged agreement to find him employment during a period of six weeks from July 20, 1903, to August 31, 1903, on which latter date the contract of service terminated by virtue of a twenty-eight days' notice posted up at the works on Monday, August 3, 1903. The amount of damages claimed was based upon the average weekly sum which the plaintiff had earned by piece work during a considerable period immediately preceding the shutting down of the works on July 20, 1903. The defendants denied that they had expressly or impliedly agreed to find the plaintiff employment; and further, in the alternative, in case the plaintiff should make out a *prima facie* case of such a contract, they set up a custom to the effect that they were entitled temporarily to shut down their works, and suspend the employment of their men, whenever they were not

C. A. in a position to obtain orders or specifications for orders at  
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Now the plaintiff had first of all to shew that the express or implied agreement which he relied upon existed. If he failed in making out that *prima facie* case he failed altogether; if he succeeded in doing so, then the burden of proving the custom to cut down that *prima facie* case would rest upon the defendants. The plaintiff had been for thirteen years in the regular employment of the defendants at their Cilfrew works. The terms of his employment were partly contained in certain printed rules applicable to workmen in all departments of those tinplate works. The first of such rules as posted up at the works was as follows: "No person regularly employed shall quit or be discharged from these works without giving or receiving twenty-eight days' notice in writing, such notice to be given on the first Monday of any calendar month before 12 o'clock at noon." Rule 2 provided for certain fines upon workmen for (amongst other things) "refusing to work when required." Rule 11 was in these words: "Every workman in the various departments of the works will, when required by the manager or agent, perform such duties as may be deemed necessary in case of emergency other than the special work he may be engaged in." Rule 14 was: "Nothing herein contained shall in any way prejudice or affect the rights and remedies which either party might otherwise have under the laws for the time being affecting master and servant." The plaintiff, like most of the employees, was paid by piecework, or, in other words, received wages *pro rata* according to the number of boxes turned out in a day. The rates of payment were fixed, and could not be altered by the defendants without the consent of the masters' association to which the defendants belonged. On July 20, 1903, the defendants, without notice, shut down their works, and the plaintiff had to go without pay till August 31, 1903, when the twenty-eight days' notice given on Monday, August, 3, 1903, put an end to the contract. The plaintiff contended that under the contract, and until it was terminated by a twenty-eight days' notice on either side, the defendants were bound to provide him with a reasonable amount of work by which he could earn wages. The defendants, on the

other hand, maintained that they were under no obligation to provide the plaintiff with work, but that he continued in their service until the contract came to an end by the twenty-eight days' notice, on the terms that he was bound to do work if there was any work to do, but that he took the risk while the contract lasted of having to go without work and therefore without pay.

The first question, then, is whether the plaintiff on the above facts shews an implied right on his part by the contract, unless there is a custom to the contrary, to be provided while the contract lasts with a reasonable amount of work. Apart from authority, it would be strange if such a right is not implied; for otherwise the bargain is of a very one-sided character. The workman must be at the beck and call of the master whenever required to do so, and yet he cannot, though ready and willing to work and to earn his pay, earn a single penny unless the master chooses; and this state of things may go on for a period of nearly two months, as the twenty-eight days' notice to quit the service can only be given on the first Monday in the month, and if given on the first Tuesday in the month would not expire till twenty-eight days from the first Monday in the next month. It was contended for the defendants that the workman takes the chance of work being forthcoming, and that on the very first day of the employment the master might fail to provide him with any work, so that he might have given up any other employment and might come into the defendants' service, say, on Tuesday, August 4, and remain in their service till the end of September, subject to the orders of the defendants, without earning any wages at all. It would, I think, require some very clear and binding decisions to induce any fair-minded tribunal to accept this view of the law.

What, then, is to be gathered from the cases on the subject? *Turner v. Goldsmith* (1) is an express decision of the Court of Appeal that a contract to employ a man for an agreed period at a commission to be paid to him on the sale of such goods as should be forwarded to him by sample from time to time was not fulfilled by the employers unless they supplied him with samples to a reasonable extent, and the case of *Rhodes v.*

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(1) [1891] 1 Q. B. 544.



C A. *Forwood* (1) was therein distinguished on the ground that in that case there was no contract to employ. In *Turner v. Sawdon* (2) 1906 the action was not brought for wages, nor for damages for not enabling the plaintiffs to earn wages, and the defendants were always ready and willing to pay all that was due under the contract. It was, as A. L. Smith M.R. said, a unique action, claiming damages for not enabling the plaintiff to keep in practice at his work besides earning his wages, and this claim the Court of Appeal rejected. But the Lords Justices expressly upheld the judgment in *Turner v. Goldsmith* (3) as to the implied contract to find employment for a servant whose wages were to be paid in the form of a commission. *Williamson v. Taylor* (4) and *Aspdin v. Austin* (5) are, I think, distinguishable on the ground that there was no promise to employ the plaintiff or retain him in the service: see also the remarks on those cases made in the next case to be cited. *Whittle v. Frankland* (6) is a strong authority for the plaintiff, notwithstanding the qualification in the obiter dictum of Crompton J.: "The agreement not to discharge would be quite illusory if the employer were not bound by implication to find work, that is, a reasonable amount of work if work is to be had." That dictum is not reported in the same words in the report in 2 Best & Smith. Besides, it is not disputed in the present case that "work was to be had," though the defendants did not consider that it would be remunerative to them. *Reg. v. Welch* (7) bears out the plaintiff's contention, although the words in Lord Campbell's judgment—"The necessity of giving notice clearly shews that there is some obligation on the employer. What was that? To find reasonable employment according to the state of the trade"—(if that case stood alone) might raise a possible limitation of the employer's liability. But even if the state of trade is to be taken into account, this would only be an element in fixing the reasonable amount of work to be provided. I am of opinion, therefore, both upon principle and authority, that, apart from

(1) (1876) 1 App. Cas. 256.

(2) [1901] 2 K. B. 653.

(3) [1891] 1 Q. B. 544.

(4) (1843) 5 Q. B. 175.

(5) (1844) 5 Q. B. 671.

(6) (1862) 31 L. J. (M.C.) 81, 84.

(7) (1853) 2 E. &amp; B. 357, 362.

custom, the defendants were bound to find the plaintiff a reasonable amount of work till the termination of the contract by twenty-eight days' notice.

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Then comes the question, Have the defendants established that the custom in the South Wales tinsplate trade alleged by them exists, and that it negatives the plaintiff's right to compensation for shutting down the works without notice, under the circumstances of the case? It must be assumed for the purposes of my judgment, and I find as a fact, that the defendants shut down their works on July 20, 1903, bona fide on the ground believed in by them that they could not get orders or specifications for orders at remunerative prices. Now in order to succeed the defendants must prove a custom or general usage so well known as to be properly read into the contract. It must be, as Lord Denman C.J. said in *Reg. v. Stoke-upon-Trent* (1), "A custom so universal that no workman could be supposed to have entered into this service without looking to it as part of the contract." In the same case Coleridge J. said: "I have always understood that general usage is evidence in a case of this kind, on the ground that its notoriety makes it virtually part of the contract." Now I have had before me a body of evidence on both sides. For the defendants several witnesses, including some of the largest proprietors of tinsplate works in South Wales, employing hundreds of men paid by piece-work, spoke to the existence of a custom, not challenged till recently, entitling the masters, without notice, to shut down their works and cease temporarily to provide their men with work, and therefore pay, when they were unable to obtain remunerative orders or specifications. It appeared, however, that the causes for which the works were in their experience shut down were numerous, including cases of breakage of machinery, repairs, lack of water or coal and (according to some) lack of material, and other similar causes supposed to be beyond the control of masters and men alike. For the plaintiff a number of witnesses, including workmen, secretaries of workmen's associations, and others likely to know of the alleged custom if it existed, while (most of them)

(1) (1843) 5 Q. B. 303.

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admitting a custom entitling the masters, without notice, to shut down the works on several of the last-mentioned grounds, especially breakage, repairs, and want of water or coal, absolutely denied the right to shut down for want of remunerative orders or specifications, and swore that they had never known or heard of such a custom. It is to be observed that the men would often in the nature of things be unaware of the cause of shutting down, which might be entirely in the minds of the masters, while the opportunity might be taken to do repairs at the same time, and this consideration is an important factor in judging whether the custom alleged was notorious or not. Some of the instances, too, of work being stopped or curtailed seem to have been by arrangement. Moreover, the shutting down on account of bad trade appears to have been generally accompanied by a twenty-eight days' notice to terminate the contract, as the only mode of forcing the men to make concessions as to wages, and after the expiration of the twenty-eight days' notice fresh hiring took place from day to day. In many instances when paying orders could not be got the employers did not shut down, but worked to stock. On the whole the defendants have not satisfied me of the existence of a custom that they may shut down without notice for want of remunerative orders or specifications, so universal as to be practically incorporated in the contract.

Moreover, a custom, in order to prevail, must be reasonable: see *Bradburn v. Foley* (1); and I am of opinion that the custom set up by the defendants would not be reasonable. It would place the men at the mercy of the masters as to the occasions when, for their own convenience, and looking to their own interests, the masters might think fit to stop the work. The masters would generally know some time beforehand that such a course was becoming desirable, and thus they would have time to give the twenty-eight days' notice without having for any length of time to work at a loss. The men, on the other hand, would by the custom be liable to be summarily stopped on any given day from earning wages without the means of judging whether the point at which orders are unremunerative has been fairly reached, or how long the stoppage would be likely to last, or

(1) (1878) 3 C. P. D. 129.

whether it would be wise for them on their side to give the twenty-eight days' notice to quit or not. It was admitted on behalf of the masters that the alleged custom would not entitle them *mala fide* or capriciously, or from indirect motives, to set up this ground for stoppage, nor was it alleged on behalf of the men that the masters in fact stopped on July 20, 1903, otherwise than on the *bona fide* ground that they thought the orders they could get would be unremunerative. But it is obvious that, if the right contended for by the employers existed, the men were in this respect placed at a great disadvantage in not knowing, or having the means to find out, whether the grounds put forward for stoppage were genuine or *bona fide* in any given case or not.

On all these grounds I am of opinion that the defendants have failed to cut down the contract by the alleged custom, and that the plaintiff is entitled to damages for the failure on the part of the defendants to find him reasonable work during the six weeks in question. I can think of no better mode of assessing what would have been a reasonable amount of work, and therefore a reasonable amount of pay, than to take the average wages earned by the plaintiff for some time preceding the stoppage. This was agreed to be about 2*l.* 6*s.* 8*d.* per week, making 14*l.* for the six weeks, and I give judgment for the plaintiff for that amount, with costs on the High Court scale.

The defendants appealed.

*Bunkes, K.C.*, and *Bailhache* (*Davis Williams* with them), for the defendants. The judge was wrong in holding that the defendants were bound to find the plaintiff a reasonable amount of work in the sense of such an amount as would yield an average amount of earnings. What is reasonable must be considered from the point of view of the masters as well as of the men; and it cannot be reasonable to require the masters to keep their works open at a loss. The case seems to be covered by the authority of *Williamson v. Taylor*. (1) There the defendants, colliery owners, hired the plaintiff for a year to work in

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their colliery at piece work, upon the terms that during all the times the pit should be closed the plaintiff would continue the servant of the defendants, subject to their orders and directions, and liable to be employed by them at such work as they should see fit, and would, when required, do a full day's work on every working day. It was held that the defendants were not obliged by their contract to employ the plaintiff for a reasonable number of working days during the year. That case was much more one-sided than the present, for there the men were bound for a whole year without the opportunity of determining the hiring by notice.

[FARWELL L.J. In that case the agreement was in writing, and all that the Court decided was that they were not at liberty to go outside the four corners of the written document.]

So is the contract here in writing, so far as the rules contain the terms of the contract. The only distinction between *Williamson v. Taylor* (1) and the present case is that in the former the masters were to provide other work if the pits were closed, and here they are not bound to do so. But it is not suggested here that during the stoppage of the defendants' works the workmen may not work for other employers, the only restriction upon their doing so is that they must not bind themselves by a contract with those third persons inconsistent with their contract with the defendants. Nor is it suggested that the defendants are not bound to supply the plaintiff with work, if work is to be had on terms which are not wholly unremunerative to the employers. For otherwise it might be said there was a want of mutuality. In *Reg. v. Welch* (2) the workman agreed to serve his employer as a tinplate worker for a period of twelve months, and further, until the expiration of a three months' notice by either party to determine the service. The workman was to be paid by piece work, and during the service was not to work for anyone else. It was held that the agreement was not void for want of mutuality, because it imported an obligation by the master to provide the workman with work so long as the service continued. But the Court in so holding did not mean that the master was to provide work in any event however great the loss

(1) 5 Q. B. 175.

(2) 2 E. &amp; B. 357.

to him might be, for Lord Campbell said in his judgment: "Is there not here a necessary implication that the employer shall find reasonable work? . . . The necessity of giving notice clearly shews that there is some obligation on the employer. What was that? To find reasonable employment according to the state of the trade." That the defendants are willing to do here, but the plaintiff is asking for something more. In *Whittle v. Frankland* (1), where a similar contract by a collier was held to be not void for want of mutuality, Crompton J. qualified the obligation of the employer to find work for the workman in the same manner as did Lord Campbell. "The agreement not to discharge" without notice "would be quite illusory if the employer were not bound by implication to find work, that is, a reasonable amount of work if work is to be had." If this were a contract that the plaintiff should be paid a fixed rate of weekly wages, the defendants clearly could not resist the plaintiff's claim. If, on the other hand, it were a contract for piece work without the necessity of a twenty-eight days' notice to determine the service, the defendants would be absolutely right. But the difficulty arises from the fact that the Court is called upon to construe a hybrid contract in which the parties have coupled an agreement for payment by piece work with the inconsistent provision that the service shall only be determinable upon notice. What is the implication as to providing work which the Court ought to read into the contract? Bowen L.J. in *The Moorcock* (2) said: "An implied warranty, or, as it is called, a covenant in law, as distinguished from an express contract or express warranty, really is in all cases founded on the presumed intention of the parties and upon reason. . . . In business transactions . . . what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances." Here

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(1) 31 L. J. (M.C.) 81.

(2) (1889) 14 P. D. 64, at p. 68.

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the plaintiff seeks to throw all the risks of the transaction upon the defendants. The implication which he seeks to read into the contract is that the master will run the works at full time, for nothing short of that will suffice, however great the loss to him may be. The true construction of the contract is that the risk of there being no work to be had, by reason of there being no remunerative orders obtainable, is a risk which the workman shares with the master, knowing that the master in his own interest will do his best to keep his works open, and not allow his capital to lie unproductive if he can possibly avoid it. Jelf J. relied upon the authority of *Turner v. Goldsmith* (1) as supporting the plaintiff's contention. There the defendant, a shirt manufacturer, agreed to employ the plaintiff for a period of five years as an agent to obtain orders for and sell the various goods manufactured or sold by the defendant, the plaintiff to be remunerated by commission. After two years the defendant's factory was burnt down, and thenceforth he did not supply the plaintiff with any goods for sale. It was held by the Court of Appeal that the defendant impliedly contracted to supply the plaintiff with a reasonable amount of goods during the five years to enable him to earn his commission, and that the occurrence of the fire was no excuse for the defendant's failure to perform his contract. But there the defendant employed the plaintiff to obtain orders for goods sold by the defendant as well as those manufactured by him, and he might have continued to carry on the business of a seller of shirts although he was no longer able to manufacture. Kay L.J. said: "If it had been shewn that not only the manufactory but the business of the defendant had been destroyed by vis major, without any default of the defendant, I think that the plaintiff could not recover." That case, therefore, is an authority in favour of the defendant rather than of the plaintiff. [They also referred to *Aspdin v. Austin* (2); *Rhodes v. Forwood* (3); *Turner v. Sawdon*. (4) They further contended upon the facts that there was a custom of the South Wales tinplate trade entitling the masters to shut down their works without notice in

(1) [1891] 1 Q. B. 544.

(2) 5 Q. B. 671.

(3) 1 App. Cas. 256.

(4) [1901] 2 K. B. 653.

the event of their being unable to obtain orders or specifications for orders at remunerative prices.]

*S. T. Evans, K.C.*, and *Meager*, for the plaintiff, were not called upon.

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LORD ALVERSTONE C.J. In this case I am of opinion that Jelf J. came to a perfectly right conclusion, but I wish to add a few observations of my own in confirmation of his view. I entirely agree with Mr. Bailhache that the implication which is to be drawn from this contract is one which, to use the language of Bowen L.J. in *The Moorcock* (1), is raised "from the presumed intention of the parties with the object of giving to the transaction such efficacy as both parties must have intended that at all events it should have," that "what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are business men." I am content to accept that test in deciding whether or not this contract involves the implication which is necessary to enable the plaintiff to recover. Now, in order to determine that question, the only facts that are material to be considered are that the plaintiff was in the defendants' regular employment, that he was paid by piece work, and that he was employed upon the terms of a rule which provides that "No person regularly employed shall quit or be discharged from these works without giving or receiving twenty-eight days' notice in writing, such notice to be given on the first Monday of any calendar month." I put out of consideration rule 11, as to the workmen being employed on other than their own special work in case of emergency, as it is not necessary to rely upon it, but in my opinion there is nothing in it which contradicts the implication which, to my mind, is involved in the language of the former rule. No distinction in principle can be drawn between wages by time and wages by piece. Piece work is only a method of ascertaining the amount of the wages which is to be paid to the workman. What, then, is the obligation of the employers under such a contract as the present? On the one hand we must consider the matter

(1) 14 P. D. 64, at p. 68.



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from the point of view of the employers who I agree will under ordinary circumstances desire to carry on their works at a profit, though not necessarily at a profit in every week, for it is matter of common knowledge that masters have frequently to run their mills for weeks and months together at a loss in order to keep their business together and in hopes of better times. On the other hand, we have to consider the position of the workman. The workman has to live; and the effect of the defendants' contention is that if the master at any time found that his works were being carried on at a loss, he might at once close down his works and cease to employ his men, who, even if they gave notice to quit the employment, would be bound to the master for a period of at least twenty-eight days during which time they would be unable to earn any wages at all. I agree with Jelf J. that that is an unreasonable contention from the workman's point of view. In my opinion the necessary implication to be drawn from this contract is at least that the master will find a reasonable amount of work up to the expiration of a notice given in accordance with the contract. I am not prepared to say that that obligation is an absolute one to find work at all events, for the evidence shewed that it was subject to certain contingencies, such as breakdown of machinery and want of water and materials. But I am clearly of opinion that it would be no excuse to the master, for non-performance of his implied obligation to provide the workman with work, that he could no longer make his plates at a profit either for orders or for stock. It is to be observed that the question how the works are to be carried on, whether they are going to work short or full time, or whether for stock or current orders, is a matter which rests entirely in the hands of the master. The men have absolutely nothing to say to it. And it seems to me that there is nothing unreasonable in the implication that the master shall look at least twenty-eight days ahead, or, to take the extreme case, as the notice has to be given on the first Monday in the month, fifty-seven days ahead, so as to place himself in a position to provide the workman with work during the period covered by the notice.

Then how do the authorities stand? I will deal with them

very briefly, because I can add but little to what Jelf J. has said. Speaking for myself, I think that, if the cases of *Williamson v. Taylor* (1) and *Aspdin v. Austin* (2) are to be taken as enunciating a general proposition, they would be authorities in favour of the defendants' contention that there was no obligation to find any piece work at all. But those cases were respectively decided in the years 1843 and 1844, and are inconsistent with the later cases of *Pilkington v. Scott* (3), *Reg. v. Welch* (4), and *Whittle v. Frankland*. (5) I agree that those later cases do not go the length for which the plaintiff argues, because the real point there raised was whether there was sufficient mutuality to render the contract enforceable against the workman. But at the same time they clearly prevent the cases of *Williamson v. Taylor* (1) and *Aspdin v. Austin* (2) from being cited as authorities for the proposition that there is no obligation.

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With regard to the question of the alleged custom, I may say that I have always understood that a custom cannot be read into a written contract unless, to use the language of Lord Denman C.J. in *Reg. v. Stoke-upon-Trent* (6), it is "so universal that no workman could be supposed to have entered into" the "service without looking to it as part of the contract." But here the closing of the works is a matter that depends entirely upon the will of the employer, upon the particular circumstances of the case, and upon the view that the employer takes of the prospect of trade, and as to whether it is worth his while to make plates for stock or not. Under those circumstances there can be no element of certainty about the alleged custom at all, and the defence of custom must fail.

SIR GORELL BARNES, PRESIDENT. I agree in thinking that the decision of Jelf J. was correct. Upon the question whether there existed any such custom as that set up by the defendants, namely, that they were entitled to shut down their works without notice for want of remunerative orders or specifications, I do not think we should be justified upon the evidence given in coming

(1) 5 Q. B. 175.

(2) 5 Q. P. 671.

(3) (1846) 15 M. &amp; W. 657.

(4) 2 E. &amp; B. 357.

(5) 31 L. J. (M.C.) 81.

(6) 5 Q. B. 303.

C. A.      to a different conclusion from that arrived at by the learned judge.  
1906      That leaves the question to be determined what is the implication  
DEVONALD      which ought to be adopted with regard to this contract?  
r.      The contract is one in which the workman is obliged to remain  
ROSSER &      at work until the expiration of a notice such as that contemplated  
SONS.      by the contract. Neither he nor his employer can put an end to  
The President.      the contract except in accordance with the terms provided as to  
notice in rule 1. So that there is a binding obligation to work,  
and it seems to me that there must be a necessary implication—  
an implication arrived at by applying the principles which  
Bowen L.J. laid down in *The Moorcock* (1)—that, unless restricted  
by something else, an employer ought to find work to enable the  
workman to perform his part of the bargain, namely, to do his  
work. It seems, therefore, that the question which really has to  
be considered is how far that general and necessary implication  
in such a contract is qualified by considerations as to who takes  
any particular risks which may affect the continuance of the  
work. I can quite understand that, having regard to a certain  
set of circumstances, such as breakage of machinery, it may be  
reasonable to hold that it was the intention of the parties that  
those risks should be shared, that risks of that character, which  
are known to both parties, and which prevent both from doing  
what was contemplated, should excuse from the obligation to  
maintain the continuance of the work. But that does not appear  
to me to apply to a case of this character, where the want of  
continuity of work is simply due to a lack of orders at  
remunerative prices. That is a matter which is not in any  
sense within the knowledge or control of the workman; it rests  
entirely with the employer, who can anticipate in respect of such  
matters, and who ought to know what is the probable future of  
the trade and act in time by giving the notice for which the  
contract provides. It seems to me that it is not reasonable to  
imply that the risk of that was in the contemplation of both  
sides as being taken by the workman. Therefore the general  
implication that, on the one side, the workman shall work, and,  
on the other, the employer shall find work for him to do, does  
not seem to me to be cut down by anything in this case so as to

(1) 11 P. D. 64, at p. 68.

relieve the defendants from their obligation to continue the contract and provide the necessary work. I think the judgment must be affirmed.

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FARWELL L.J. I agree. A custom to be good must be reasonable, certain, and notorious. Jelf J. has found as a fact that it was not notorious, and I certainly do not disagree with that finding. Further, in my opinion it is neither reasonable nor certain, because it is precarious, depending on the will of the master. The alleged custom that the works may be closed without notice in the case of lack of orders at remunerative prices leaves it entirely at the discretion of the master to say what is remunerative and what is not. Such a custom, to my mind, cannot be good.

The second point, which is the one mainly relied on, depends upon the question what implication the Court is to raise for the purpose of making the contract between master and servant, which in this case is not fully expressed in writing, such a reasonable contract as would be entered into by two business men. We must bear in mind that we have to regard the matter from the point of view not only of the master, but of the workman. Both master and workman have to make their living. The master makes his living by realizing a profit; the workman makes his by his wages. The master's profits are ascertained as an ordinary rule *de anno in annum*. But the workman has to live *de die in diem*, and his wages presumably do not leave a large scope for saving for a future day when no employment is forthcoming. What, then, are we to infer would be a reasonable bargain such as the parties here, being business men, must have intended to make? We are, as Bowen L.J. said, "not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances." In my opinion it would be eminently unreasonable for the master to claim the right to say, "I do not consider these prices sufficiently remunerative, and I will therefore decline to find any further



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work for the man during the time when he is bound to hold himself ready to obey my orders." On this question of reasonableness it is to be noted that judges in former days have taken the same view. In *Reg. v. Welch* (1) Coleridge J. said: "The agreement contemplates that the relation of employer and employed shall continue for twelve months and until the expiration of three months' notice, that is for fifteen months at least. It would be strange if the relation were to continue and the workman not to be paid. If there were a stipulation for paying a salary one could understand it; but here the stipulation is only for payment for the articles manufactured, at certain prices. . . . The necessary implication is that the master is to find work." And Crompton J. said the same thing. Lord Campbell, it is true, did not state the master's obligation in quite such general terms; he said that it was "to find reasonable employment according to the state of the trade." I am not sure that I follow that qualification, but I do not think that it has any bearing on the present case, because he could not have intended it to mean that what the master thinks is reasonable, without reference to the interests of the workman, can afford any excuse for not finding work. The suggested difficulty as to what would constitute a reasonable amount of work was not found to be any difficulty in *Whittle v. Frankland* (2), and I do not myself see that it presents any difficulty here. The contract in the present case contains a clause, rule 11, which I confess appears to me to have some bearing in the workman's favour. The rules do not mention piece work or any particular form of work. The contract by the employer to employ is to be gathered either from the words "regularly employed," or from the implication which is necessary in order to prevent the contract from being unilateral. But the contract may be piece work, or it may be that mentioned in rule 11, which provides that the workman is to hold himself ready to obey the orders of the master in whatever way he thinks it necessary to employ him. Whatever the kind of work on which the workman is employed, the rights and obligations of the respective parties are treated as standing on the same footing.

There is one other consideration which it is fair to put forward,

(1) 2 E. & B. 357.

(2) 31 L. J. (M.C.) 81.

and that is that the rules are drawn up by the masters, and if they had desired to put such a burden as this upon the workmen, of holding themselves at the masters' orders for twenty-eight, or possibly fifty-seven, days without work and without pay, it was their duty to say so in express terms.

One or two cases have been relied upon by the defendants as authorities in their favour. One was the case of *Williamson v. Taylor*. (1) There the agreement was in writing, and the Court held that they were bound to judge of its meaning and intent only by its terms, and that there was no room for any further implication. And in *Aspdin v. Austin* (2) Lord Denman C.J. expressed the same view that "where parties have entered into written engagements with expressed stipulations it is manifestly not desirable to extend them by any implications; the presumption is that, having expressed some, they have expressed all the conditions by which they intend to be bound under that instrument." And in *Rhodes v. Forwood* (3), where the parties had provided in their written agreement a certain protection for themselves with reference to the duration or continuance of the agreement, Lord Cairns said: "Now I ask, the parties having provided this kind of protection for themselves, upon what principle is it that your Lordships are to introduce into and to imply in the agreement what, it is admitted, is not found expressly there?" He was there dealing with an agreement which, on the face of it, apparently contained all the terms that the parties had agreed upon, and in such a case it is a strong thing to ask the Court to imply anything further. But that is not the case here. I think the contract here was that for which the plaintiff contended, and that the judgment of Jelf J. was perfectly right.

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*Appeal dismissed.*

Solicitors for plaintiff: *David Randell & Saunders, Swansea.*

Solicitors for defendants: *J. T. Lewis, for James & Thomas, Swansea.*

(1) 5 Q. B. 175.

(2) 5 Q. B. 671.

(3) 1 App. Cas. 256, at p. 265.

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## CAIRNEY v. BACK.

July 31 ;  
Aug. 3.

*Company—Debenture-holder—Floating Security—Receiver—Judgment Creditor—Attachment of Debts—Garnishee Order Absolute—Priority—Rights of Garnishee—Preferential Payment—Salary—Secretary of Company—“Clerk or Servant”—Preferential Payments in Bankruptcy Act, 1888 (51 & 52 Vict. c. 62), s. 1, sub-s. 1 (b)—Preferential Payments in Bankruptcy Act Amendment Act, 1897 (60 & 61 Vict. c. 19), s. 3.*

In January, 1906, a limited company issued to the plaintiff a mortgage debenture creating a first charge by way of floating security over all the property for the time being of the company. On June 15, 1906, the defendant obtained judgment against the company, and served a garnishee order nisi on a bank in respect of a sum of money standing to the credit of the company in the books of the bank. On June 25 the garnishee order was made absolute. On June 29 a receiver of the assets of the company was appointed on behalf of the plaintiff under the powers contained in his debenture. An interpleader issue having been directed to determine whether the plaintiff or the defendant was entitled to the money:—

*Held*, that a garnishee order absolute does not transfer to the garnishor the property in the garnished debt, and that consequently the fact that the receiver was not appointed until after the garnishee order had been made absolute was immaterial, and that the plaintiff was therefore entitled to the money in priority to the defendant.

*In re Combined Weighing and Advertising Machine Co.*, (1889) 43 Ch. D. 99, and *Norton v. Yates*, [1906] 1 K. B. 112, applied.

*Robson v. Smith*, [1895] 2 Ch. 118, distinguished.

A secretary to a company may be a “clerk or servant” within s. 1, sub-s. 1 (b), of the Preferential Payments in Bankruptcy Act, 1888, but a secretary who does not give his whole time to the service of the company and discharges the general duties of his office by a clerk appointed and paid by himself is not a “clerk or servant” within the section.

### TRIAL of an interpleader issue.

The questions raised by the issue were, first, whether a sum of 98*l.* 3*s.* 4*d.*, part of 166*l.* 5*s.* 3*d.*, was the property of the plaintiff Cairney under and by virtue of a mortgage security in his favour from the Consolidated Mines, Limited, dated January 27, 1906, or whether the 98*l.* 3*s.* 4*d.* was payable to the defendant under a garnishee order; secondly, whether the defendant was entitled to a preferential claim on the 98*l.* 3*s.* 4*d.* for salary as the secretary of the Consolidated Mines, Limited, under the

Preferential Payments in Bankruptcy Act, 1888 (1), and the Preferential Payments in Bankruptcy Amendment Act, 1897. (2)

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The defendant was appointed secretary of the Consolidated Mines, Limited, in April, 1905. On January 27, 1906, he being still secretary, a mortgage debenture was issued by the company to the plaintiff in respect of an advance made by him to the company. The debenture was in the ordinary form, and created a first charge by way of floating security over all the property for the time being of the company, and empowered Cairney to appoint a receiver of the property of the company. The debenture was registered on February 8, 1906.

On June 15, 1906, the defendant obtained judgment against the company for 96*l.* 1*s.* 4*d.* for arrears of salary and 2*l.* 2*s.* costs. On the same date he obtained and served a garnishee order nisi upon the Commercial Bank of Scotland, with whom the company had an account which was then in credit to the extent of 166*l.* 5*s.* 3*d.* Notice of the garnishee order nisi was given to the plaintiff Cairney on June 18, and on June 25 the order was made absolute. On June 29 a receiver was appointed of the assets of the Consolidated Mines, Limited, on behalf of Cairney under the powers contained in his debenture bond.

The bank paid the money into Court, and this issue was directed to be tried.

The evidence of the defendant with regard to his employment on which he based his claim to preferential payment as a "clerk or servant" within s. 1, sub-s. 1 (b), of the Preferential Payments in Bankruptcy Act, 1888, was to the

(1) Preferential Payments in Bankruptcy Act, 1888, s. 1, sub-s. 1: "In the distribution of the . . . assets of any company being wound up . . . there shall be paid in priority to all other debts—(b) All wages or salary of any clerk or servant in respect of services rendered to . . . the company during four months before the . . . commencement of the winding-up, not exceeding fifty pounds."

ruptcy Act Amendment Act, 1897, s. 3: "In case a receiver is appointed on behalf of the holders of any debentures or debenture stock of a company secured by a floating charge . . . the debts mentioned in s. 1" of the Act of 1888 "shall be paid forthwith out of any assets coming to the hands of the receiver . . . in priority to any claim for principal or interest in respect of such debentures or debenture stock."

(2) Preferential Payments in Bank-



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following effect:—He described his duties as the ordinary duties of a secretary; he had to attend directors' meetings, attend to correspondence and callers, and keep the minute book. He had no particular hours of attendance at the company's office, but was generally there from 12 to 2. He had a clerk in the company's office, whom he paid, whose hours of attendance were from 10 to 5. The defendant was also registrar of another company, his duties to which required his attendance from 10 to 4.

*J. D. Crawford* (*Henn Collins* with him), for the plaintiff. A garnishee order, whether nisi or absolute, does not operate as a transfer of the debt, and the rights of the garnishor are subject to the prior rights of the debenture-holder: *Norton v. Yates* (1); *In re Combined Weighing and Advertising Machine Co.* (2) It is immaterial that in this case the receiver was not appointed until after the garnishee order had been made absolute, whereas in *Norton v. Yates* (1) the appointment was made between the dates of the order nisi and the order absolute. That point is disposed of by the decision in *Geisse v. Taylor* (3), where the debenture was only issued after the date of the order absolute. So far as its effect on the debt is concerned, and as regards the rights of a debenture-holder, an order absolute is no better than an order nisi: *In re London Pressed Hinge Co.* (4)

With regard to the claim for preferential payment, the secretary of a public company is not a "clerk or servant" within s. 1, sub-s. 1 (*b*), of the Preferential Payments in Bankruptcy Act, 1888. Further, the fact that the defendant was not in the exclusive employ of this company, but gave the greater part of his time to another company of which he was registrar, is fatal to this claim: *Ex parte Oldham* (5); *In re Newspaper Proprietary Syndicate* (6); Baldwin on Bankruptcy, 9th ed. p. 644; Williams on Bankruptcy, 8th ed. pp. 157, 158.

*M. Hill*, for the defendant. The defendant is entitled as against the debenture-holder to be paid the amount of the

(1) [1906] 1 K. B. 112.

(2) 43 Ch. D. 99.

(3) [1905] 2 K. B. 658.

(4) [1905] 1 Ch. 576.

(5) (1858) 32 L. T. (O.S.) 181.

(6) [1900] 2 Ch. 349.

garnished debt. The distinction between a garnishee order nisi and an order absolute is that in the latter case the garnishee is bound to pay the debt to the garnishor. At the date of this order absolute no receiver had been appointed, and the debenture-holder had therefore a mere floating security, which was inoperative. This distinguishes the present case from *Norton v. Yates*. (1) *Robson v. Smith* (2) shews that the right to immediate payment which the defendant had acquired by reason of the garnishee order absolute cannot be affected by the subsequent appointment of the receiver, and if the bank had paid the money to the defendant the plaintiff could not have compelled the bank to pay him as well. If the argument for the plaintiff is sound the fact that the garnishee in *Robson v. Smith* (2) had paid the debt to the garnishor would have made no difference. No distinction can in law be drawn between actual payment, as in *Robson v. Smith* (2), and an order giving a right to immediate payment. The defendant did all the duties which are usually discharged by a secretary, and a secretary is a "clerk or servant" within the Act in question. He is none the less a clerk or servant because he does other work for another employer.

*Henn Collins* replied.

*Cur. adv. vult.*

Aug. 3. WALTON J. This is an interpleader issue, and the parties to it are practically the plaintiff Cairney on the one hand and the defendant Back on the other. The plaintiff is the holder of a debenture of the Consolidated Mines, Limited, dated January 27, 1906. The defendant was secretary of the company from April, 1905, until June, 1906. On June 15, 1906, the defendant obtained judgment against the company for 96*l.* 1*s.* 4*d.* for arrears of salary and costs amounting to 2*l.* 2*s.*, and on the same date he obtained a garnishee order nisi upon the Commercial Bank of Scotland, with whom the Consolidated Mines, Limited, had an account which was in credit to an amount exceeding 98*l.* 3*s.* 4*d.* There was no doubt as to the liability of the bank to the company, but as the 98*l.* 3*s.* 4*d.* was claimed by the defendant under his judgment

(1) [1906] 1 K. B. 112.

(2) [1895] 2 Ch. 118.

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and also by the plaintiff under his debenture the bank obtained relief by way of interpleader and brought the money into Court. The question which I have to decide is whether the 98*l.* 3*s.* 4*d.* belongs to the plaintiff or to the defendant.

The garnishee order nisi was, as I have said, made on June 15. Notice of it was given to Cairney on June 18. On June 25 the order nisi was made absolute. On June 29 a receiver was appointed of the assets and property of the company on behalf of the plaintiff under the powers contained in his debenture. What are the rights of the parties under these circumstances? On behalf of the defendant it is said that he has got a perfectly good security as against the plaintiffs by virtue, at any rate, of the garnishee order absolute, which was obtained before the appointment of the receiver. It is necessary to recall what the garnishee order absolute really is. It does not give any further effect to the charge upon the debt which was created by the order nisi. The order nisi on June 15 bound the debt in the hands of the bank, and, although it is called an order nisi, it is in fact the order which creates the charge once for all, and not merely conditionally. The order absolute which follows is not an order dealing with the charge which has been already created, but is an order on the garnishee to pay the amount of the debt to the garnishor. Thus, on June 25 the defendant had an order on the bank to pay him the sum of 98*l.* 3*s.* 4*d.*, but before the bank had paid him the receiver was appointed. This kind of question has previously been before the Courts, and certain points have been definitely decided. The latest case is *Norton v. Yates* (1), decided by Warrington J. In that case Yates had obtained judgment against a company on January 17, 1905, and on the same day he had obtained a garnishee order nisi charging a debt owing by a certain firm to the company. On January 19 a receiver and manager of the company was appointed in a debenture-holder's action, and notice of this appointment was served on Yates on January 20, on which day the garnishee order was made absolute. No payment was made under the order, and interpleader proceedings followed. Warrington J. held that the effect of the garnishee order nisi was not to transfer to Yates, the garnishor, the company's right to the debt, and that the debt

(1) [1906] 1 K. B. 112.

remained the property of the company, no doubt subject to the charge upon it, until on January 19 the receiver was appointed, who then became entitled to receive and hold all the property of the company, including the debt which was the subject of the order nisi, because, as Warrington J. held, there being nothing but a charge on the debt, the charge was subject to the prior charge created by the debenture, and the receiver therefore took priority over the garnishor. The difference between that case and the present is that in *Norton v. Yates* (1) the garnishee order had not been made absolute at the date when the receiver was appointed, whereas here it had been; but Warrington J. in *Norton v. Yates* (1) followed the decision of the Court of Appeal in *In re Combined Weighing and Advertising Machine Co.* (2), where it was held that a person who has obtained a garnishee order absolute directing a company to pay him a debt due by them to a debtor of his against whom he had recovered judgment does not thereby himself become a creditor of the company, and it appears plain from that decision that it would have made no difference in *Norton v. Yates* (1) if the garnishee order had been made absolute before the receiver was appointed.

On behalf of the defendant Back the case of *Robson v. Smith* (3) was relied on. In that case a garnishee order had been made absolute against the defendant Smith ordering him to pay to the garnishor a debt owing by him to a certain company. Subsequently the plaintiff Robson, who was the holder of a debenture of the company, gave notice in writing to Smith of his debenture, claiming that under it he was entitled to be paid all debts owing to the company. Notwithstanding this notice Smith complied with the garnishee order and paid the debt to the garnishor, and the plaintiff then sued Smith, contending that the latter had no right to pay the garnishor after receiving notice of the debenture. Romer J. held that Smith could not be called upon to pay the debt over again. It is true that in that case no receiver had been appointed, but I do not decide that that makes any difference. It is contended on behalf of the defendant in the present case that since *Robson v. Smith* (3)

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shews that, if the bank had paid the money to the defendant under the garnishee order absolute they could not be called upon to pay it over again to the plaintiff, it makes no difference, an order for payment having been made, that the money has not in fact been paid. I do not think that *Robson v. Smith* (1) establishes that proposition. All that it decides is that if the garnishee has paid the garnishor under the order he cannot be made to pay the debt over again, even if the payment to the garnishor was made with notice of the debenture-holder's claim. I do not think that the decision in *Robson v. Smith* (1) applies to the facts of this case. The question here is as to equities between the debenture-holder and the garnishor. It is contended that the effect of the order absolute as against the debt is much the same as an execution levied on chattels; but even supposing that a garnishee order absolute can be said to be analogous to the seizure of chattels under a fi. fa., putting the garnishor in possession of the debt in the same way that a seizure under a fi. fa. puts the sheriff in possession of the chattels, I am afraid that that will not assist the defendant, because it was held in *Davey v. Williamson* (2) that, even as against the sheriff who has seized goods under a fi. fa., the title of a debenture-holder prevailed, although the rights of the debenture-holder had not "crystallized," as it is termed, that is, the time for payment had not arrived. For these reasons I have come to the conclusion that the rights of the plaintiff Cairney under his debenture must prevail over the rights of the defendant Back under the garnishee order absolute.

Another question is raised, as to whether the defendant is not in any case entitled to be paid something in respect of his salary under the provisions of the Preferential Payments in Bankruptcy Act, 1888, which is applied to cases like the present by the Preferential Payments in Bankruptcy Amendment Act, 1897.

In order to ascertain whether the defendant has any claim as a "clerk or servant" under those Acts it is necessary to consider what his duties were and what were the services he rendered. In his evidence he described his duties as the ordinary duties of a secretary; he had to attend directors' meetings, attend to

(1) [1895] 2 Ch. 118.

(2) [1898] 2 Q. B. 194.

correspondence and callers, and keep the minute book. If the evidence had stopped there, I think I should have held that he was a clerk or servant within the Act. But the defendant further stated that he had no particular hours of attendance at the company's office, but was generally there from 12 to 2, that he had a clerk, whom he paid, whose hours of attendance were from 10 to 5. The defendant was also registrar of another company, his duties to which required his attendance from 10 to 4. The evidence really amounts to this, that the defendant called at the office of the Consolidated Mines, Limited, to see what was going on; he attended meetings of the directors and whenever he was sent for, but the general work of the company which would have fallen within his department was really done by the clerk whom the defendant paid. In my opinion the priority given by the section was intended to apply to the wages due in respect of the personal services rendered by the clerk or servant. The defendant did not exactly serve the company, but provided services, attending himself occasionally when required. For these reasons I think that the defendant's claim under this head also fails, and there must therefore be judgment for the plaintiff.

*Judgment for plaintiff.*

Solicitor for plaintiff: *J. F. Jones.*

Solicitor for defendant: *James Ballantyne.*

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1906 ASHBY'S COBHAM BREWERY COMPANY, PETITIONERS.

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July 24.

*In re* THE CROWN, COBHAM.

ASHBY'S STAINES BREWERY COMPANY, PETITIONERS.

*In re* THE HAND AND SPEAR, WOKING.

*Licensing Acts—Compensation on non-renewal of Licence—Mode of ascertaining Value of Licence—Evidence of Trade done by the House, Admissibility of—Consideration of Licence-holder's Interest—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 2—Finance Act, 1894 (57 & 58 Vict. c. 30), s. 7, sub-s. 5.*

By the joint effect of s. 2 of the Licensing Act, 1904, and s. 7, sub-s. 5, of the Finance Act, 1894, where the renewal of a licence is refused under the former Act the amount of the compensation payable on such non-renewal is, in the absence of agreement, to be based on the price which the licensed premises "would fetch if sold in the open market":—

*Held*—(1) That as amongst the possible purchasers in the open market would be brewers, and as the price which they would be willing to pay would depend upon the profits which they might fairly expect to make by the supply of liquor to the licensed premises, it is material to inquire into the quantity and quality of the trade previously done by the house under normal conditions and apart from any considerations of a personal or special character, such as the popularity of the licence-holder or the proximity of the licensed premises to the brewery.

(2) That there cannot, in addition to the brewer's profit arising from the ownership of the premises and the supply of liquor thereto, be taken into consideration the possible profit which his tenant might expect to make by retailing the liquor so supplied.

APPEALS from the Commissioners of Inland Revenue under s. 2 of the Licensing Act, 1904.

Ashby's Cobham Brewery Company are a limited company, and are the registered owners of the licensed premises known as the Crown, at Cobham, in the county of Surrey, in respect of which there was in force at the times material to the appeal a licence for the sale by retail of spirits, wines, beer, cider, &c., to be consumed either on or off the premises, which licence was also in force at the date of the passing of the Licensing Act, 1904. The tenant of the house and licence-holder was one Charles Rawson, who held under an agreement dated October 4, 1887, on a yearly tenancy at a rent of 20*l.* a year, free from all rates. He was under covenant to purchase all his beer from Ashby's

Cobham Brewery Company, and his tenancy was terminable at any time on one month's notice.

At the adjourned general annual licensing meeting held at Kingston-on-Thames, on March 2, 1905, the justices of the licensing district of Kingston-on-Thames, acting as the renewal authority, renewed the licence provisionally, and referred the question of the renewal of the licence to the quarter sessions for the county of Surrey. The quarter sessions decided to refuse the renewal of the licence subject to the payment of compensation under the Licensing Act, 1904, and the amount of the compensation money was left to be determined by the Commissioners of Inland Revenue.

On November 25, 1905, the Commissioners notified to the said company their determination that the amount of the compensation money payable in respect of the refusal to renew the said licence was 455*l.*

Against that determination the company appealed to the High Court, claiming that the amount of compensation should have been 2839*l.*

The petitioners in the second appeal, Ashby's Staines Brewery Company, are a limited company, and are the registered owners of the licensed premises known as the Hand and Spear, situate at Woking, in the county of Surrey, in respect of which there was in force at the times material to the appeal a licence for the sale by retail of beer, ale, and porter to be consumed either on or off the premises, which licence had been continuously in existence from a date prior to May 1, 1869. This house, like the Crown, was in the occupation of a tenant as a tied house.

At the adjourned general annual licensing meeting held at Guildford on March 8, 1905, the justices of the licensing district renewed the licence provisionally, and referred the question of the renewal of the said licence to the quarter sessions of the county of Surrey. The quarter sessions decided to refuse the renewal subject to the payment of compensation under the said Act, and the amount of compensation payable was left to the determination of the Commissioners of Inland Revenue.

On November 25, 1905, the Commissioners notified to the said

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company their determination that the amount of the compensation money so payable was 500*l.*

Against that determination the company appealed to the High Court, claiming that the amount of the compensation should have been 1669*l.* 9*s.*

*Cripps, K.C.*, and *C. C. Hutchinson*, for the petitioners on both appeals. Sect. 2 of the Licensing Act, 1904 (1), which deals with the payment of compensation on non-renewal of a licence, provides by sub-s. 1 that the amount shall be "the difference between the value of the licensed premises (calculated as if the licence were subject to the same conditions of renewal as were applicable immediately before the passing of this Act and including in that value the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence) and the value which those premises would bear if they were not licensed premises"; and, by sub-s. 2, that if the amount is not agreed upon by the persons interested in the licensed premises

(1) Licensing Act, 1904, s. 2, sub-s. 1: "Where quarter sessions refuse the renewal of an existing on licence under this Act, a sum equal to the difference between the value of the licensed premises (calculated as if the licence were subject to the same conditions of renewal as were applicable immediately before the passing of this Act and including in that value the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence) and the value which those premises would bear if they were not licensed premises shall be paid as compensation to the persons interested in the licensed premises."

Sub-s. 2: "The amount to be so paid shall, if an amount is agreed upon by the persons appearing to quarter sessions to be interested in the licensed premises and is approved by quarter sessions, be that amount, and in default of such agreement and

approval shall be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal to the High Court as on the valuation of an estate for the purpose of estate duty, and in any event the amount shall be divided amongst the persons interested in the licensed premises (including the holder of the licence) in such shares as may be determined by quarter sessions:

"Provided that in the case of the licence-holder regard shall be had not only to his legal interest in the premises or trade fixtures but also to his conduct and to the length of time during which he has been the holder of the licence; and the holder of a licence, if a tenant, shall (notwithstanding any agreement to the contrary) in no case receive a less amount than he would be entitled to as tenant from year to year of the licensed premises."

and approved by the quarter sessions it "shall be determined by the Commissioners of Inland Revenue in the same manner and subject to the like appeal to the High Court as on the valuation of an estate for the purposes of estate duty." That refers to s. 7, sub-s. 5, of the Finance Act, 1894 (1), by which "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased." Therefore the first figure in the computation which the Commissioners are to ascertain is the price which the licensed premises would fetch in the open market. Now the most usual purchasers of licensed premises are brewers, and as the price which a brewer would be willing to give would necessarily depend upon the profit that he might expect to make out of supplying beer to the house, and as the amount of that probable profit would depend upon the trade that the house had previously done, it is impossible to ascertain the price which the premises would fetch in the market without inquiring into the quantity and quality of the trade done there during the immediately preceding years. In the present cases the Commissioners declined to receive any evidence as to the past trade of the houses. Therein they were wrong. It is true that by s. 7, sub-s. 8, of the Finance Act, "Subject to the provisions of this Act the value of any property for the purpose of estate duty shall be ascertained by the Commissioners in such manner and by such means as they think fit"; but that does not mean more than that they may get the information in the best way they can; it does not mean that they have a discretion to arbitrarily exclude evidence which is relevant and material. Further, as amongst the possible purchasers of the licensed premises in the open market would be a brewer who wished to purchase with the object of occupying the premises himself through a manager, the price which such a purchaser would be willing to pay would be somewhat higher than that which would be paid by a brewer who purchased with the intention of letting to a tenant, for he would expect to make

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(1) By the Finance Act, 1894, s. 7 sub-s. 5: "The principal value of any property shall be estimated to be the price which, in the opinion of the Commissioners, such property would fetch if sold in the open market at the time of the death of the deceased."

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two profits out of the premises instead of one. He would make a profit as a brewer by supplying the house with his beer, and another profit as occupier by retailing the beer to the customers. Therefore the price which the licensed premises will fetch in the open market will be the price which a brewer purchaser would give who contemplated making both those profits. And that this was the meaning of the Legislature seems clear from the fact that s. 2, sub-s. 2, provides for a share of the compensation money being given to the tenant as one of the persons interested in the licensed premises ; for unless the value of the premises in the market is to be taken as enhanced by the probable tenant's profits, the tenant's share of the compensation would have to come out of the landlord's pocket, which would be unfair. To the price which the premises would so fetch in the market, that is to say, the capitalized value of those profits plus the capitalized rent of the house, is to be added the amount of the depreciation of trade fixtures arising from the refusal to renew the licence. The words of s. 2, sub-s. 1, "including in that value the amount of any depreciation, &c.," mean "adding to that value, &c." From the sum of those two figures is to be deducted the price which the premises would fetch in the market without the licence. The result is the amount of the statutory compensation, which in the present appeals is represented by the sums respectively claimed by the petitioners. [Evidence was given by the petitioners in each case to establish the value of the licensed premises on the basis of the above contentious, including evidence of the amount of the trade previously done by the houses respectively.]

*Sir J. Lawson Walton, A.-G., Sir W. Robson, S.-G., and Lowenthal*, for the Commissioners of Inland Revenue. It is conceded that for the purpose of ascertaining the price which the licensed premises will fetch it is not unreasonable to inquire into the amount of the business that has been usually done there. But the amount of the business, taken by itself, is not a true guide to the real value. The contention of the petitioners leaves out of sight the many risks to which property of this kind is subject. The trade will fluctuate with the personal popularity and aptitude of the tenant ; the licence is liable to

complete destruction in the event of certain kinds of misconduct on the part of the tenant; and the licensing justices may, as a condition of renewal of the licence, require a considerable expenditure on the repair of the premises. All these elements of risk ought to be taken into consideration as diminishing the value considerably below a sum representing the full capitalized value of the brewer's profits. Again, the brewer would be able to supply the beer more cheaply if the licensed premises were close to the brewery than if they were at a distance, and he might be willing to give a higher price where that was the case. But that fact ought not to be taken into consideration in assessing the value of the premises. To the price which a purchaser in the market would give who intended to let to a tenant nothing is to be added in respect of the value of the tenant's interest. The Act was not intended to give full compensation for all the interests affected by the refusal to renew. The compensation to the tenant is given on a compassionate, and not a legal, principle. For instance, he is to be treated as at least a yearly tenant, even though his tenancy is in fact terminable at a month's notice. To the market value of the premises nothing is to be added for depreciation of fixtures. The words "including in that value, &c.," mean what they say—the market value is to be taken as including the amount of the depreciation.

*Cripps, K.C.*, in reply.

July 24. KENNEDY J. delivered the following written judgment:—These two compensation cases, as I was informed by counsel at the hearing, have been selected for the consideration of the High Court of Justice, in order that certain questions of principle may receive a judicial determination. In regard to these questions, there appears to be no distinction between the two cases. The licence in the case of the Hand and Spear, belonging to Ashby's Staines Brewery Company, Limited, and situated in Woking old village, is of the kind commonly described as a pre-1869 beerhouse licence. The licence in the case of the Crown is not. The Crown is a house in Cobham belonging to Ashby's Cobham Brewery Company, Limited, and is fully licensed for the sale of all

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intoxicating liquors. But the differences between the two houses in regard to the nature of the licence, locality or trade, and structural condition, though they may affect the computation of the amount due for compensation, do not affect the application of the general principles which cover the computation in both cases alike. It is therefore best, in my opinion, to deal in the first instance with the points of principle common to the two cases which formed the subject of argument before me. The material statutory provisions are to be found in the Licensing Act, 1904, s. 2, and the Finance Act, 1894, s. 7. The conjoint effect of these sections—I omit all that relates merely to procedure as to the calculation of the amount of compensation—is (1.) that a sum equal to the difference between the value of the licensed premises and the value which those premises would bear if they were not licensed premises shall be paid as compensation to the persons interested in the licensed premises; (2.) that the value of the licensed premises shall be calculated as if the licence were subject to the same conditions as were applicable immediately before the passing of the Licensing Act of 1904; (3.) that in that value shall be included the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence; (4.) that the value of the property, that is to say (a) the premises as licensed and (b) the premises without the licence, shall be the price which such property would fetch if sold in the open market. The result of the legislation, in my judgment, shortly is that the tribunal in the two cases with which I am now dealing—the High Court of Justice, on appeal from the Commissioners of Inland Revenue—has to assess the amount of compensation by finding the price of the licensed premises in the open market, adding to that the depreciation, if any, of the trade fixtures, and deducting from this sum the price which the premises would fetch in the open market if unlicensed. The division between the persons interested in the licensed premises of the amount of the compensation when so assessed devolves, under the Licensing Act, 1904, s. sub-ss. 2 and 3, upon quarter sessions, with a power, if they think fit, to refer that question to the county court, in accordance with rules of Court to be made for the purpose.

Three questions of general principle which affect both the cases before me have been discussed by counsel at the hearing. The first of these is the meaning of the words of the Licensing Act, s. 2, sub-s. 1, "including in that value the amount of any depreciation of trade fixtures arising by reason of the refusal to renew the licence." The Solicitor-General has contended that the proper interpretation of those words is that you are not on account of such depreciation to make any addition to the market price of the licensed premises. I agree with him in thinking that the language is not so clear as it might be, but upon the whole I prefer, as I have already indicated, the opposite view. It appears to me that the more natural and, if I may presume to say so, the more equitable construction of the direction to "include" is that the amount of depreciation of the trade fixtures by reason of the non-renewal is not to be left out of the computation of value. If the Legislature intended the opposite, it would have been so easy to say that the depreciation of trade fixtures was not to be included in the money computation that I cannot but think that it would have done so.

The two further and much more important questions of principle discussed before me were, first, the method by which the market value of the licensed premises ought to be arrived at; and, secondly, the question whether in the valuation should be included any assessment of the tenant's interest in the premises as distinct from that of the landlord. In regard to the first of these two points, it appears to me that there is really little room for controversy; indeed, ultimately the counsel for the petitioners and the counsel for the Commissioners appeared to be in substantial accord. What is the object of our inquiry? I cannot do better than adopt the language of the interesting memorandum of Sir Henry Primrose, the chairman of the Board of Inland Revenue, which was read to me by Mr. Cripps in his argument. It is to find the price which the owner of the freehold of the premises might expect to obtain for them, qua premises enjoying the privilege of a licence, if sold in the open market. In the case of an owner who is not a brewer and lets the licensed premises to a tenant, whether such tenant

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be the actual occupier of the premises or a brewery company who sublet, you may be able fairly to find the market value by a capitalization of the annual value based upon a true rack rent. Such an owner presumably gets, not merely the normal rent appropriate to the character of the hereditament, but also an addition to such rent attributable to the existence of the licence. But the case of licensed premises so let at a rack rent by an owner who is not himself in the trade is, I should suppose, not the most common case which has to be dealt with under the statutory enactments in the event of non-renewal of the licence which we are now considering. The owner of the premises may be himself the occupier. Then there is no rent upon which an annual value can be based. Or again—and this probably is the commonest case—the circumstances may be the circumstances with which I have to deal in reference to the Crown and the Hand and Spear, viz., the ownership of a brewer or a brewery company, and the tenancy of a lessee who occupies the licensed premises as a “tied” house. In such a case a rent is paid to the owners, but it is nothing like a rack rent; you cannot justly base upon the rent a calculation of value to the owner. I was referred, in the course of the argument upon another point, to the case of *Page v. Ratliffe*. (1) There in the course of his judgment Stirling J. observes (2),: “The value to the brewer is, first, the rent, and, secondly, the profit derived from the sale of the beer. In estimating the amount which would be reached at an auction you take both into consideration, and assess them, and put them together. The fair value, therefore, includes the value of the profit derived from the sale of beer to the house.” Unquestionably the most likely purchasers of the licensed premises of which it is the duty of this Court to find the price in the open market, the bidders upon the degree of whose competition that price will ordinarily depend, are the brewers—“the class of persons” (to quote from the memorandum) “who for reasons germane to their business as brewers have inducements to pay exceptional prices for licensed premises.” The judgment of all possible purchasers, but especially of this most important class, as to the price which it will be worth while to

(1) (1896) 75 L. T. (N.S.) 371.

(2) *Ibid.* at p. 373.

pay for the licensed premises will mainly depend upon the amount of profit which a brewer owner might fairly expect to make by the supply of liquors to the tenant for consumption by his customers. It appears to me that it cannot be right for the tribunal or authority which has to ascertain the market value of licensed premises to refuse to admit evidence of profit which the possible purchaser would certainly treat as a most material factor in the formation of a right judgment as to the value of the licensed premises. What is that evidence? Evidence of the amount and quality of the liquors supplied to the house over such a period of time as will serve to exclude the risk of erroneous inference due to the influence of purely temporary or accidental circumstances. Plainly this is the most important fact for the possible purchaser to know, although he will, of course, as a matter of common prudence, also take into account the position and structural condition of the premises themselves, and the past history, the present state, and the probable future of the surrounding district. Having got the facts as to the amount and quality of the liquors supplied to the tenant, the possible purchaser will be able to estimate the profit which may reasonably be attributed to the premises apart from rent with more or less correctness according to his greater or less knowledge of the brewing business. This Court having no knowledge of that business must be guided by the evidence of experts. But I entirely agree with the learned Attorney-General and Solicitor-General that such evidence as to profits must not include facts of a personal or special character. The evidence as to profit must be evidence of the profit which would be made ordinarily and normally—if I may be allowed the use of the expression—in the brewing trade, not of profit arising from purely personal or other peculiar advantages, such as the possession of secret processes of brewing or of special plant or the proximity of the brewery to the licensed premises. In my opinion the learned Attorney-General was quite justified in arguing that any evidence as to the profit which may be made by the selling company upon this trade cannot be material, because that depends on questions of management and the cost of brewing beer by them; in other words, it depends upon considerations which are personal to the owners, and might not

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obtain, and would not be expected to obtain, in the event of the acquisition of the property by a purchaser who might conduct his business on entirely different principles. I do not assent to the further proposition, which he appeared to me to suggest in a part of his argument which immediately followed that which I have quoted, that evidence of the quality of the liquors supplied is inadmissible because the purchaser might choose to sell different beer, manufactured in a different way, and have a smaller ratio of return upon his outlay. To the estimate of the annual profit, which according to the ordinary course of the brewers' trade may be treated as likely to be derived from the supply of liquors to the licensed premises, there has to be added, in order to get a basis for the calculation of their market value, the rent which may be obtained from the tenant—the annual sum, that is to say, which he will be willing to pay in anticipation of the profits which he will receive from the retail sale of the liquors supplied to him by the brewers. Here, again, the actual rent is in itself evidence, although, of course, not conclusive evidence. It may be proved by other evidence that the purchaser should expect to get from his tenant a lower or a higher rent. But the annual profit and the annual rent having been obtained, there still remains, in order to ascertain the market value of the licensed premises, the question of the proper capitalization of each. As to this I have not to consider any dispute of principle. The number of years' purchase which should be adopted will vary, as it seems to me, with the character of the premises, the circumstances of the locality, the prospects of the improvement of the business done in the particular premises, the general state of the liquor trade, and the competition in the market for the acquisition of this class of property; and the assessing tribunal must in each case of dispute decide according to the weight of the evidence of competent witnesses. In both the cases with which I am dealing the inquiry has been conducted in all respects upon the lines which I have indicated as being, in my opinion, proper and legitimate lines. Indeed, I must confess myself unable to see in what other way the market value of licensed premises could satisfactorily be ascertained in any case in which there is no full rack rent to serve as a guide to the true annual value.

I proceed now to consider the remaining matter of principle which is in controversy in the present cases, namely, the propriety of the inclusion in the amount of compensation of a sum representing that which is called the interest of the tenant of the licensed premises. The petitioners claim to add to the total sum of the capitalized brewers' profits, the capitalized rent, and the depreciation of trade fixtures, a figure which their expert witnesses put forward as representing such interest. The respondents contest, and in my judgment rightly contest, this claim. I do not think any such addition is authorized by the statutes which govern these proceedings. Those statutes prescribe as the amount of compensation a sum which is composed of the value of the licensed premises in the open market, less their value as unlicensed premises, and plus depreciation of trade fixtures. There is no suggestion anywhere that in order to ascertain the amount of compensation the value of the various interests in the premises is to be computed. Nor is any such computation a factor in the calculation of the market price of the premises. Neither this Court nor the Commissioners of Inland Revenue, before whom the matter came at an earlier stage, have any concern with the division of the amount of compensation. In my view the Legislature has plainly indicated how the fund is to be calculated. This scheme, as I understand it, is not at all analogous to the scheme of compensation of interests where property is compulsorily transferred under the Lands Clauses Act. The provisions of s. 2 of the Licensing Act, 1904, as I read them, embody a scheme of that which may fairly be termed equitable compensation for the loss, whenever a licence is not renewed under s. 1, of a valuable interest which otherwise might reasonably be expected to endure, although no legal right of permanence could be claimed for it. So the Legislature has created a fund out of the value of the licence, which the quarter sessions is to apportion as it deems just between all persons who are interested in the premises in respect of which the licence has ceased to exist. The assessment of the compensation, as the Solicitor-General put it, is to be made purely upon a property basis. Out of a fund which represents the value of the property in the market plus the sum for depreciation of fixtures and minus the value of the

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premises without the licence, and which, in its composition, has no relation to the values of the several interests affected, the statute decrees an apportionment by way of compensation in which all persons interested in the premises, the tenant as well as the owner, are to share as the quarter sessions may deem fair and right. That which I have ventured to describe as the equitable character of the scheme appears, I think, prominently in the provisions for the treatment of the licence-holder which are contained in s. 2, sub-s. 2, "Provided that in the case of the licence-holder regard shall be had not only to his legal interest in the premises or trade fixtures, but also to his conduct and to the length of time during which he has been the holder of the licence, and the holder of a licence, if a tenant, shall (notwithstanding any agreement to the contrary) in no case receive a less amount than he would be entitled to as tenant from year to year of the licensed premises." The provision as to the inclusion in the amount of compensation of a sum for the depreciation of the value of trade fixtures by reason of the non-renewal of the licence (as I interpret that provision) appears to me to point the same way. The trade fixtures may belong to the landlord only; they may belong to the tenant only; they may belong partly to the one and partly to the other. But, to whomsoever they belong, the sum which represents the amount of the depreciation is to go into the common fund for compensation which the quarter sessions is to divide amongst all persons interested in the premises. It appears to me that to add to the statutory constituents of the amount of compensation a sum which represents an estimate of the interest of the tenant is a proceeding which is neither consistent with the express provisions of the statutes (the Licensing Act, 1904, and the Finance Act, 1894) nor agreeable to the nature of the general scheme of the legislation contained in the Licensing Act.

[The learned judge then proceeded to deal with the evidence, and found in the case of the Crown that the capitalized annual value of the brewers' profits amounted to 1412*l.* 10*s.* To that he added 360*l.* as the capitalized value of the rent, and a further sum of 25*l.* for the depreciation in the trade fixtures, making in all 1797*l.* 10*s.* From that sum he deducted 300*l.* as representing

the value of the premises without the licence, and assessed the amount of compensation at 1497*l.* 10*s.*

In the case of the Hand and Spear he allowed a slightly larger number of years' purchase of the annual value of the brewers' profits than in the case of the Crown, by reason of the licence being a pre-1869 licence, and fixed the capitalized value of those profits at 858*l.* To that he added 432*l.* for capitalized rent and 25*l.* for depreciation of fixtures, making in all 1315*l.* Deducting from that sum 192*l.* as the value of the premises without the licence, he assessed the amount of compensation at 1123*l.*]

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*Judgment accordingly.*

Solicitors for petitioners: *Godden, Son & Holme.*

Solicitor for respondents: *Solicitor for the Inland Revenue.*

J. F. C.

# ADAMS v. MARYLEBONE BOROUGH COUNCIL.

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*London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 91—Settlement of Difference between building and adjoining Owners—Compensation for Damage to Trade—Jurisdiction of Surveyors.*

*Aug. 8, 9.*

Where a difference has arisen between a building owner and an adjoining owner under s. 90 of the London Building Act, 1894, with respect to the raising of a party wall the surveyors appointed under s. 91 to settle that difference have no jurisdiction to award compensation to be paid by the building owner to the adjoining owner for damage caused to the latter's trade by the execution of the work.

## APPEAL from the Marylebone County Court.

On August 11, 1904, the Marylebone Borough Council, being the building owners under the terms of the London Building Act, 1894, of the premises known as 34, John Street, Edgware Road, served notice under s. 89 of the said Act upon Maria Adams, lessee of the adjoining house, 33, John Street, where she carried on the business of a restaurant-keeper, she being the adjoining owner thereof within the meaning of the Act, stating their intention to raise the party wall to a certain height in the notice specified. A difference having arisen within the meaning of



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s. 90 between the council and Adams with respect to the proposed building, the difference was referred, under s. 91, to three surveyors. An arbitration was held, and the surveyors in their award ordered the council to carry up the adjoining owner's flues and do certain other work for her benefit, and to make good any structural damage to her premises; but they refused to award her any compensation for damage temporarily caused to her in her trade as a restaurant-keeper by reason of the execution of the work.

From that award Adams appealed to the county court, but the county court judge held that the surveyors had no jurisdiction under s. 91 (1) to award such consequential damages, and dismissed the appeal.

Adams appealed to the High Court.

*Poyser and Koppel*, for the appellant. At common law, apart from the Building Act, one joint owner of a party wall which was raised without his consent in such a way as to cause damage of this description would have been entitled to recover such damage by action. Under the old Building Act of 1774 (14 Geo. 3, c. 78), which authorized the raising of party walls in the metropolis, the adjoining owner's right to recover for collateral damage resulting therefrom, such as the obstruction of his lights, was not taken away: *Wells v. Ody*. (2) For such damage he still had his remedy by action. For that remedy proceedings before the surveyors are now substituted by the Act of 1894, but the extent of the remedy remains the same. There is nothing in the Act to indicate an intention to cut down the injured party's rights. Sect. 91 gives the surveyors power to "settle

(1) By the London Building Act, 1894, s. 91, sub-s. 1: "In all cases not specially provided for by this Act where a difference arises between a building owner and adjoining owner in respect of any matter arising with reference to any work to which any notice given under this part of this Act relates" surveyors are to be appointed who "shall

settle any matter from time to time during the continuance of any work to which the notice relates in dispute between such building and adjoining owner with power by . . . their award to determine the right to do and the time and manner of doing any work and generally any other matter arising out of or incidental to such difference."

(2) (1836) 1 M. & W. 452.

any matter . . . . in dispute" between the parties, and to determine by their award the right to do and the manner of doing any work "and generally any other matter arising out of or incidental to such difference." Those words are wide enough to include consequential damage of the kind here claimed. In certain cases the Act expressly empowers the surveyors to give compensation even for mere inconvenience. Thus s. 93, sub-s. 3, provides that "The building owner shall be liable to compensate the adjoining owner and occupier for any inconvenience loss or damage which may result to them by reason of the exercise of the powers conferred by this section." And by s. 95, sub-s. 2 (b), "If any party structure which is of proper materials and sound, or not so far defective or out of repair as to make it necessary or desirable to pull it down be pulled down and rebuilt by the building owner . . . . a fair allowance in respect of the disturbance and inconvenience caused to the adjoining owner shall be borne by the building owner." Those sections shew that the Legislature did not limit the jurisdiction of the surveyors to dealing with structural damage, but left it to them to deal with all classes of damage.

*G. A. Scott and Rittner*, for the respondents. The surveyors had no jurisdiction to award the damages claimed, which are not a "matter arising out of or incidental to such difference" within the meaning of s. 91. The sections referred to—s. 93, sub-s. 3, and s. 95, sub-s. 2 (b)—do not assist the appellant. They no doubt do give a power to award compensation for disturbance in the cases to which those sections refer. Sect. 93 only applies to a case of a building owner proposing to dig his foundations out to a lower level than those of the adjoining owner, and that is not this case. The same observation applies to s. 95. Moreover, the fact that the Legislature thought fit in those cases to give compensation for disturbance in express terms suggests that they did not intend to do so in cases in which they are silent on the subject.

*Poyser* in reply.

**RIDLEY J.** The question raised in this case is whether the surveyors who were appointed under s. 91 of the London Building

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Act, 1894, to settle a difference between the building owner and the adjoining owner were entitled to award compensation to be paid by the former to the latter in respect of damage caused to the latter's trade by the raising of a party wall. In my opinion they were not. It is not unimportant to observe that during the fifty years during which the present Act and the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), of which the present Act is largely a re-enactment, have been in force such a claim has never been put forward. But the decision must turn upon the language of the Act itself, and it therefore becomes necessary to examine that language. Sect. 88, which deals with the rights of the building owner in relation to party structures, provides that he shall have a right to underpin, repair or rebuild party structures which are defective, or which are not built conformably to the regulations of the Act, and to rebuild any party structure of insufficient strength for any building intended to be built on it, and to do certain other acts in relation thereto. Sect. 89 gives the adjoining owner a right to require the building owner, where he proposes to exercise any of the foregoing rights, to build on the party structure certain chimney breasts, flues, &c., for the adjoining owner's convenience. Sect. 90 provides that the building owner shall, before exercising his rights, give a party structure notice to the adjoining owner, who is thereupon empowered to give a counter-notice to the building owner requiring him to build any of the works specified in s. 89, and if either owner does not within fourteen days after receipt of the notice express his consent a difference is to be deemed to have arisen between them. Then s. 91 provides that in cases in which such a difference has arisen surveyors are to be appointed who are to "settle any matter from time to time during the continuance of any work to which the notice relates in dispute between such building and adjoining owner with power by . . . their award to determine the right to do and the time and manner of doing any work and generally any other matter arising out of or incidental to such difference." Those are the words upon which Mr. Poyser has relied. But I do not think that upon any fair construction they can be held to cover such a thing as consequential damage owing to trade disturbance. The difference between the parties is as to the way

in which the work is to be carried out, and loss of trade cannot be said to arise out of or be incidental to that difference. It has been contended that the intention of the Legislature was to give the adjoining owner full compensation for all damage suffered by him as the result of the exercise by the building owner of any of the rights given to him by the Act, and two sections are relied on as pointing to that conclusion. First, s. 93 provides that a building owner who intends to erect a building within ten feet of the adjoining owner's building and to carry his foundations down to a lower level than those of the latter building may underpin the latter, and shall "compensate the adjoining owner and occupier for any inconvenience loss or damage which may result to them by reason of the exercise of the powers conferred by this section." And secondly, by s. 95, sub-s. 2 (b), if a building owner pulls down and rebuilds a party structure which is not defective he is to make "a fair allowance in respect of the disturbance and inconvenience caused to the adjoining owner." But it is enough to say that the cases dealt with by those two sections are not the present case, and that there are no corresponding words in s. 91 under which the present case falls. It may well be that the Legislature thought it proper that in cases such as those in ss. 93 and 95, where the building owner interfered with the party structure solely for his own purpose, and not for the common benefit of all parties, he should be under a wider liability in respect of compensation for damage done; and the fact that compensation in those two cases is expressly provided for leads to the inference that it was not intended to give such compensation in others. In my view the scope of this Act was to enable people to build or to improve buildings free from the vexatious restrictions which were imposed by the common law in the case of joint ownership of party structures. But I do not think it was intended to provide a remedy for every damage that was caused by exercising the powers thereby conferred. In the two cases mentioned it does provide such a remedy, in others it does not.

DARLING J. The question raised in this case presents difficulties to my mind. The defendants, in raising this party wall,

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were not doing an illegal thing, nor were they doing a legal thing negligently. Therefore it is not apparent that the plaintiff could recover the damages claimed by any other process than that provided by the Act. And where the Act permits the doing of things which without it would amount to actionable wrongs, it undoubtedly in some cases provides that compensation shall be awarded by the surveyors. There are plain words to that effect in the two sections to which we have been referred, s. 93, sub-s. 3, and s. 95, sub-s. 2 (b). And I have entertained considerable doubts during the argument whether that was not the general intention of the Act. But on consideration I have come to the conclusion that the absence of definite words from the appropriate place in s. 91 is fatal to the plaintiff's claim. The appeal will therefore be dismissed.

*Appeal dismissed.*

Solicitor for appellant: *W. Stubbs.*

Solicitors for respondents: *Mackrell, Maton, Godlee & Quincey.*

J. F. C.

[IN THE COURT OF APPEAL.]

LOWE v. DORLING & SON.

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*Landlord and Tenant—Distraint on Goods of Lodger—Illegal Distress—Liability of Bailiff to Action—Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), s. 2.*

An action will lie, under s. 2 of the Lodgers' Goods Protection Act, 1871, against a bailiff for an illegal distress.

Judgment of the King's Bench Division, [1905] 2 K. B. 501, affirmed by the Court of Appeal (Fletcher Moulton L.J. and Farwell L.J., Collins M.R. dissenting).

APPEAL from a judgment of a Divisional Court, reported [1905] 2 K. B. 501.

The action was brought in the Bow County Court to recover damages for an illegal distress.

The plaintiff was a lodger on premises of which the rent to the superior landlord had become in arrear. On June 22, 1904,

the defendants, acting as bailiffs for the superior landlord, levied a distress on the premises and seized (inter alia) a piano belonging to the plaintiff.

The plaintiff on July 8 served the bailiff with a declaration under s. 1 of the Lodgers' Goods Protection Act, 1871, setting forth that the piano was his property; but the defendants on August 12 sold the piano.

At the trial in the county court it was contended that no action lay against the bailiff under s. 2 of the Lodgers' Goods Protection, Act, 1871 (1); but the county court judge held that, as the section declared that under such circumstances the bailiff was to be deemed guilty of an illegal distress, an action would lie.

The defendants appealed to a Divisional Court, who dismissed the appeal. (2)

The defendants appealed.

Aug. 3. *C. E. Jones and Ronald Walker*, for the defendants. The remedy of the lodger whose goods are distrained is two-fold. He may apply to a magistrate for an order for the restoration of his goods, and the magistrate may make an order for the recovery of the goods, or make an order which, under the circumstances, may seem just. So much of the section applies to the person, whether landlord or bailiff (as now no "other person" can

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(1) 34 & 35 Vict. c. 79, s. 2: "If any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an

order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into."

(2) [1905] 2 K. B. 501.

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distrain), who has taken the goods. The second remedy, which is brought into contrast by the word "also," is against the landlord alone. This clearly meets the justice of the case, for the lodger is the only person who can go before the magistrate, and no time is fixed within which he must do so. In this case the goods were not sold for many weeks after the seizure. If the lodger takes no steps to recover his goods, the bailiff can do nothing, and must pay over the money to the landlord. He has not then got either the goods or the money, but under the decision of the King's Bench Division he is liable, at any time within six years, to an action, although it may have become impossible for him to trace the landlord and make him responsible. The landlord who has the money is the person who naturally is selected as the person to be liable to an action, and in that action, as in the summary proceedings, the truth of the declaration and inventory may be inquired into. There is no magic in the words "illegal distress," and there is authority that "illegal" may be read as meaning unlawful or excessive. If so read in this section it becomes quite clear. Something has been done which the law says should not be done, and for that there is a cheap and effective remedy by application to the magistrate, and a further remedy, if the first is not exercised or is not considered efficient, by action against the landlord. Before the Act there was no remedy for the lodger whose goods were seized for a distress, and the summary process was apparently suggested by s. 39 of the Metropolitan Police Courts Act, 1839, which gave power to deal summarily with cases of excessive distress, and had been found to work well. The Act under consideration gave a new right and a new remedy, and, under a well-established rule, the lodger must be restricted to that remedy: *Barraclough v. Brown* (1); *Wake v. Sheffield Corporation* (2); *Lamplugh v. Norton*. (3) The decision in *Page v. Vallis* (4), overruled by the Court below, was right, and should be supported.

*Clavell Salter, K.C.*, and *Schwabe*, for the plaintiff. Two cases of illegal distress have been before the Courts in which the bailiff

(1) [1897] A. C. 615.

(2) (1883) 12 Q. B. D. 142.

(3) (1889) 22 Q. B. D. 452.

(4) (1903) 19 Times L. R. 393.

was a defendant, and in neither was it suggested that he was not liable: *Morton v. Palmer* (1); *Thwaites v. Wilding*. (2) The Metropolitan Police Courts Act, 1839, has nothing to do with lodgers. The Lodgers' Goods Protection Act, 1871, recites the hardship of the existing law, and enacts, for the protection of the landlord, that the lodger must take certain steps. If a levy is made after these steps are taken it is expressly declared that the person who makes the levy, or proceeds with it, is to be deemed guilty of an illegal distress. The natural consequence must follow that an action will lie against that person at the suit of the lodger, for the matter is made a tort, and carries with it the remedies applicable to a tort. Those remedies are not excluded by the right of recourse to a magistrate, which is a distinct remedy, and does not cover all the damage that the lodger may have sustained: *Ross v. Ruge-Price* (3); *Stubbs v. Martin*. (4) The difficulty raised as to the words "the superior landlord shall also be liable to an action at law" are got over by the consideration that they were intended to shew not merely that the bailiff should be guilty of an illegal distress, but that the landlord, who otherwise might be considered as not liable for the act of the bailiff in making an illegal, as distinguished from an irregular, distress, was to be liable in the former case.

[They cited also *Shepherd v. Hills* (5); *St. Pancras Vestry v. Batterbury*. (6)]

Ronald Walker, in reply.

*Cur. adv. vult.*

Aug. 7. COLLINS M.R. read the following judgment:—

The question on this appeal under the Lodgers' Goods Protection Act, 1871, is whether the bailiff employed by a landlord to distrain is liable to an action at the suit of a lodger whose goods have been seized. I must begin by reading s. 2 of that Act. I have great difficulty in adopting the interpretation placed upon this section by the Divisional Court. Reading the section down to "illegal distress," we find that three persons "shall be

(1) (1881) 51 L. J. (Q.B.) 7; 45 L. T. 426.  
(2) (1883) 11 Q. B. D. 421; 12 Q. B. D. 4.

(3) (1876) 1 Ex. D. 269.  
(4) [1895] 2 I. R. 70.  
(5) (1855) 11 Ex. 55.  
(6) (1857) 2 C. B. (N.S.) 477.

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deemed guilty of an illegal distress"—viz., the superior landlord, the bailiff employed by him, and any other person employed by him. Whatever the meaning to be placed on the words "shall be deemed" when read in their context, they apply equally to all three, and all remedies open to the party grieved by an illegal distress would presumably be available equally against all three. Then come the words providing for application to the magistrate by the lodger, and the restoration to him, after inquiry, of the goods seized; and then comes the provision which gives rise to the main difficulty in this case—"and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into." What is the meaning of this special provision of a remedy against one only of the three persons all of whom on the hypothesis were already liable as wrong-doers under the first part of the section? It was contended by the appellant that this clause gave the key to the construction of the whole section, and shewed that the Legislature, while establishing the right against all three to have the goods recovered as upon a distress by supposition illegal, confined the remedy by action to one against the superior landlord only, in which the question of legality was still deliberately left open by the permission reserved to inquire into the truth of the declaration and inventory. The Court below felt this difficulty, and have met it in this way. They have held that this is a special additional remedy against the landlord only, and is to be explained as intended to cover cases where the landlord, but for this permission, would not be liable for the act of his bailiff because the latter had travelled outside his mandate. But where do the Court find any such implication of enlarged liability so as to make the landlord responsible for acts outside the bailiff's authority, and why should such an intention be attributed to the Legislature in this particular class of distress rather than in any other? The cases in which the authority given is not wide enough to cover the act done are rare, and why should we suppose an injustice enacted in order to meet them? There is not a word in the section upon which to found such inference, and I am not prepared to accept it. Some other

hypothesis, therefore, must be found to explain the introduction of this clause providing a remedy against the landlord only. None was suggested which did not involve the admission that the Legislature had deliberately put the landlord in a different position from the other parties to the distress. We have got to collect the intention of the Legislature from the section as a whole. I do find in it a dominant intention to put the landlord in a different position from the other parties named, and there is no injustice in this, since he is the person who gets the benefit of the distress, while the lodger, who is acquiring a new remedy, cannot complain if it does not embrace a personal right of action against the bailiff in addition to the summary remedy for the recovery of the goods. Reading the expression "deemed guilty of an illegal distress" with the subsequent words of the section, I think it may be fairly interpreted as not intended to create a right of action against the parties concerned, in addition to the recovery of the goods which the magistrate is enabled to order, on the hypothesis grounding his jurisdiction that they were illegally seized, the distress being "deemed" provisionally illegal for that purpose only. This is consistent with the subsequent clause, which keeps the truth of the declaration and the inventory, and therefore the illegality, open for inquiry in the action if brought. But even if it be read as prima facie involving a right of action, may not the express enactment of a right of action only against the landlord be treated as rebutting this presumption? This interpretation is at least free from the gratuitous assumption of a malign intention on the part of the Legislature to create a novel liability in the landlord for acts outside the scope of his agent's authority, which is the foundation upon which alone the opinion of the Court below would seem to rest. Apart from this unexpressed and purely imaginary intention, they would be bound, on their argument, to admit either that the Legislature regarded what had gone before as not creating any right of action against anyone, and so had enacted one against the landlord; or, if it deemed the words capable of the larger interpretation, had proceeded to rebut it by naming only the landlord as the person against whom it might be brought. I am aware that in the

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view which I have expressed I am differing not only from the learned and careful judge of county courts whose single opinion would suffice to make me doubt my own, but also from the Court below, and, I am afraid, from my colleagues in this Court. I am not sure, however, that they are all agreed inter se, and, as my opinion accords with that of Darling J. in the case which the decision appealed from has overruled, I feel that I am bound to express it.

FLETCHER MOULTON L.J. read the following judgment:—

This is an appeal from a decision of a Divisional Court supporting a judgment of the judge of the Bow County Court, which held that a bailiff who has distrained on goods belonging to a lodger, who had brought himself within the provisions of s. 1 of the Lodgers' Goods Protection Act, 1871, by serving the bailiff with an inventory and declaration as therein set forth, is guilty of an illegal distraint, and that an action will lie against him for damages for such distraint at the suit of the lodger upon whose goods he has distrained.

The case turns entirely upon the interpretation of s. 2 of that Act. By the earlier portion of s. 2 it is provided as follows: "If any superior landlord, or any bailiff, or any other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress. . . ." Speaking for myself, these words appear capable of only one interpretation, which is that which was put upon them by the Court below—namely, that a superior landlord, bailiff, or other person so levying or proceeding with a distraint on the lodger's goods shall be, in the eye of the law, guilty of an illegal distress and subject to the well-known legal consequences to which a person who has committed such a tort is liable. I may put it in another way. The old system of pleading was in use at the passing of the Act. In my opinion, a judge trying an action

against one of the persons named, in which there was a count for illegal distress, must have told the jury that they must bring in a verdict of guilty on that count if the necessary facts, as set out in the section, were proved or admitted.

In thus deciding I am not taking a new view of the meaning of the statute; this is the interpretation which must have been put on the section by this Court as far back as the year 1881. In the case of *Morton v. Palmer* (1) an appeal in an action against a bailiff for illegal distraint under the provisions of this section came before this Court, consisting of Brett, Cotton, and Lindley L.JJ., the grounds on which the judgment in favour of the plaintiff was challenged being that the judge had not properly directed the jury as to what constituted a lodger within the Act. The Court sent the case back for a new trial to determine whether the plaintiff in the action came within the term "lodger," a course which they could not have adopted if they had not been of opinion that the section made the bailiff liable for an illegal distraint on the lodger's goods. It is true that the special point raised before us was not raised in that case, but this takes little from its authority as a binding decision, because the point is one of interpretation of the statute, and goes to the very root of the action. The principle upon which it is suggested that the action does not lie—viz., that it is a case where a special tribunal is named as the only means of enforcing a new remedy—is so well known that it must have been present to the minds of the eminent Lords Justices who were parties to that decision, and would have been acted on by them if they had thought that it applied to that case. In the year 1883 *Thwaites v. Wilding* (2), an action under this Act against a superior landlord and the bailiff employed by him, came under the consideration of a Divisional Court, and, although in that case judgment was entered for the defendant on the facts, it is clear from the judgments delivered that the judges had no doubt that the effect of the section was to render both the superior landlord and the bailiff liable for an action for illegal distress if they came within its provisions. Indeed, it is not until the decision in *Page v. Vallis* (3), by Darling J., in

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(1) 51 L. J. (Q.B.) 7; 45 L. T. 426. (2) 11 Q. B. D. 421.

(3) 19 Times L. R. 393.



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the year 1903, in which he held that no action would lie against a bailiff under the section, but that the only remedy was an action against the superior landlord, that I can find any difference of opinion on the point.

I will presently examine the later portion of the section to see if it in any way takes away from or qualifies the enactment contained in the earlier portion; but before I do so I wish to point out that the words of the section which I have already quoted specifically enact that each of the persons there mentioned—namely, the superior landlord, the bailiff, or other person employed by the superior landlord to make the levy—shall be deemed guilty of an illegal distress. The form of the enactment is not that the distress shall be illegal, so that we are left to the principles of the common law to ascertain who must be taken to be liable for the wrong. On the contrary, the tortious act is made statutably the act of the persons named, i.e., the superior landlord and the person actually making the distress, whether he be bailiff or not. I can see no ground upon which we can abstain from giving full effect to these provisions. An illegal distraint is a thing well known to the law, and the legal remedies in respect of it against the persons who are guilty of the act are perfectly well established. By enacting that the persons named shall be deemed to be guilty of an illegal distraint, I can draw no other conclusion than that the Legislature intended that they should be liable to the same consequences as if the distress on the lodger's goods was an actual illegal distress at common law.

But it is said that the latter part of the section negatives this interpretation. It cannot be denied that this portion of the section is in itself obscure, and that it gives rise to considerable difficulty of interpretation. Its drafting leaves much to be desired. It speaks of an application being made to a justice of the peace which has to be heard by two justices. It states that they shall make "such order for the recovery of the goods or otherwise as to them may seem just," leaving undefined what is the extent of the jurisdiction and what form of order can be made under that jurisdiction, which, being created by the section itself, cannot be a jurisdiction whose limits are defined by any other statute or

by common law. Finally, it states that the superior landlord shall also be liable to an action at law at the suit of the lodger without any indication as to the relation of the proceedings before the magistrate to such an action. But, although it may be difficult to construe this latter portion of the section, I am satisfied that there is nothing in it which would justify us in treating it as taking away from the clear enactment that the superior landlord and the bailiff are to be deemed guilty of illegal distraint. Its object is different. It is not intended to work out the consequences of the enactment with regard to illegal distress, which it is quite inadequate to do, but to give to the lodger a summary procedure for recovering possession of his goods. This procedure was new, but was no doubt suggested by a somewhat analogous provision applicable only to the metropolis, which was enacted in the year 1839, and under which goods seized by wrongful distress within its limits are very commonly recovered by the owners. But, although no doubt suggested by that section, there is no reference to the earlier enactment, and the words of the section must be construed as they stand. They enable the magistrates, in my opinion, to make an order for the return of the goods or any part of them, or to refrain from making any order at all, as they may think just, but they give to them no other powers. There is nothing in the section which makes it incumbent on the lodger to avail himself of this process, and it is evident that as a remedy it would in many cases be most imperfect, falling far short of the protection afforded by the provision as to the levy being an illegal distress. An order made by the magistrates under the powers of the section would no doubt affect the damages recoverable for illegal distress in that, if obeyed, it would affect the actual amount of damage suffered by the lodger, but otherwise I do not see that the existence of this summary method for recovering the goods would affect the rights of the lodger in respect of the illegal distress.

We now come to the words which have chiefly operated in giving rise to the conflict of decisions. It is argued by the appellant that the words "and the superior landlord shall also be liable to an action at the suit of the lodger"

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indicate that no action will lie except against the superior landlord. I do not think that this is the meaning. These words seem to me to have been inserted to prevent it being supposed that a lodger by availing himself of this beneficial provision for the summary recovery of his goods, would preclude himself from enforcing any other rights under the section, and there is therefore a specific provision that the superior landlord shall also be liable to an action. It may be that the reference to the superior landlord, and to him alone, in this part of the section operates, on the principle of "*expressio unius exclusio alterius*," to shut the lodger out from an action against the bailiff or person employed by the superior landlord in case the lodger avails himself of the summary procedure; but that is a point which does not arise in the present case, and I reserve my opinion upon it. With this possible exception, the whole of the latter part of the section appears to me to be ancillary and not antagonistic to the remedy by action of illegal distress. Even if this exception exists it would not, in my opinion, conflict with my interpretation of the rest of the clause. The Legislature may well have thought that if the lodger had availed himself of this means of recovering his goods, he would be sufficiently protected by the reservation of his action against the landlord alone. The double reference in the latter part of the section to an inquiry into the truth of the declaration and inventory is puzzling, but it does not bear on the point before us. It amounts, in my opinion, to nothing more than enacting that no estoppel shall arise to either party from the decision of the magistrates with regard to the truth of the inventory and declaration. I am, therefore, of opinion that the decision of the Court below was correct, and that this appeal should be dismissed. I am aware that the explanation that I have given above of the last words of the clause is not quite the same as that given by the Lord Chief Justice, who suggested that these words might be intended to meet the case where a superior landlord had directed, but had not himself actually made the distraint. But this difference of view is unimportant, and does not affect the main question, and it is not to be wondered at that such differences should exist in the case of provisions so

obscurely worded. The difficulty of finding any clear meaning in the later words of the clause only emphasizes the clear language of the earlier portion. The interpretation suggested by the appellant would amount to cutting out the words "bailiff or other person" from the provision as to the persons who are to be deemed guilty of an illegal distress, and for this I can find no justification.

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FARWELL L.J. read the following judgment:—

I am of opinion that the decision of the Divisional Court is correct. The preamble of the Act shews that the Legislature thought that lodgers suffered great loss and injustice, and were minded to remedy it. The first section accordingly provides for the protection of the lodger's goods on payment by him to the superior landlord of the rent (if any) then due to his immediate landlord on the lodger making a declaration; if such declaration be wilfully untrue, the lodger "shall be deemed guilty of a misdemeanour." It is clear that by these latter words without more the lodger would be liable to be indicted and to fine or imprisonment or both.

The 2nd section then provides that in certain cases the superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress. The words "illegal distress" are well known and have a well defined signification. I observe that the first count in the declaration in *Lewis v. Read* (1) was for "illegally distraining." As the words at the end of s. 1 brought the false declaration within the familiar category of misdemeanour, so these words in s. 2 bring a new set of circumstances within the familiar category of illegal distress. There were, and are, two well-known remedies for illegal distress at common law, replevin and action for damages, which might be brought against the wrong-doer, whether landlord or bailiff, but the landlord was not liable for an illegal distress by his bailiff unless he had antecedently authorized or subsequently ratified it: see *Lewis v. Read*. (1) This Act gives a further and summary remedy; for, although replevin enabled the restoration of the goods distrained, the remedy was hampered

(1) (1845) 13 M. & W. 834.



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by the necessity for giving security. Now, the distinction between a statute creating a new offence with a particular penalty and a statute enlarging the ambit of an existing offence by including new acts within it with a particular penalty is well settled. In the former case the new offence is punishable by the new penalty only; in the latter it is punishable also by all such penalties as were applicable before the Act to the offence in which it is included. The rule was recognized by Lord Mansfield in *Rex v. Wright* (1), and in a note to 2 Hawkins's Pleas of the Crown (1824 ed.), p. 290, is thus stated: "The true rule seems to be this: where the offence was punishable before the statute prescribing a particular method of punishing it, then such particular remedy is cumulative, and does not take away the former remedy; but where the statute only enacts 'that the doing an act, not punishable before, shall for the future be punishable in such and such a particular manner,' there it is necessary to pursue such particular method, and not the common law method of indictment." The same principles apply equally whether the offence is regarded as an invasion of public rights calling for criminal or of private rights calling for civil proceedings: see *Shepherd v. Hills*. (2) In my opinion, therefore, the words "shall be deemed guilty of an illegal distress" import the common law remedies by action of replevin or for damages as clearly as if those remedies had been inserted in terms in the Act, and those remedies can only be got rid of by striking out the words "shall be deemed guilty of an illegal distress," and this appears to me impossible. It is true that the last clause of s. 2 is not happily expressed, but it is capable of meaning, as the Lord Chief Justice thought, that the landlord shall in any case be liable, whether he has authorized or adopted the act of the bailiff or not; and this does not strike my mind as so unjust as to be impossible. It may well be that the injustice to the lodger of the existing law appeared to the Legislature to outweigh this possible injustice to the landlord. Acts of Parliament are not, in my experience, expressed with such accuracy and precision as to justify the Court in striking out unambiguous words in order to make a sentence grammatical or logical. The generality of

(1) (1758) 1 Burr. 543.

(2) 11 Ex. 55.

the maxim "Expressum facit cessare tacitum," which was relied on, renders caution necessary in its application. It is not enough that the express and the tacit are merely incongruous; it must be clear that they cannot reasonably be intended to co-exist. In *Colquhoun v. Brooks* (1) Wills J. says: "I may observe that the method of construction summarised in the maxim 'Expressio unius exclusio alterius' is one that certainly requires to be watched. . . . The failure to make the 'expressio' complete very often arises from accident, very often from the fact that it never struck the draftsman that the thing supposed to be excluded needed specific mention of any kind." Lopes L.J. in the Court of Appeal (2) says: "The maxim 'Expressio unius exclusio alterius' has been pressed upon us. I agree with what is said in the Court below by Wills J. about this maxim. It is often a valuable servant, but a dangerous master to follow in the construction of statutes or documents. The exclusio is often the result of inadvertence or accident, and the maxim ought not to be applied, when its application, having regard to the subject-matter to which it is to be applied, leads to inconsistency or injustice." It is also worthy of observation that two cases have been decided in this Court in which this point was not taken, although it would have been a complete defence.

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*Appeal dismissed.*

Solicitor for plaintiff: *H. E. Tudor.*

Solicitor for defendants: *C. C. Sharman.*

(1) (1887) 19 Q. B. D. 400, at p. 406.      (2) (1888) 21 Q. B. D. 52, p. 65.

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DAVIS v. PETRIE.

Aug. 3.

*Bankruptcy—Assignment for benefit of Creditors—Debts collected by Trustee—Assignor adjudicated Bankrupt—Money collected not paid to Trustee in Bankruptcy—Right to recover from original Debtor—Bankruptcy Act, 1883 (46 & 47 Vict. c. 52), ss. 43, 49.*

A trader executed a deed of assignment of all his property for the benefit of his creditors. The trustee under the deed demanded and received from the defendant a debt due from her to the trader. Within three months from the execution of the assignment the trader was adjudicated bankrupt, the assignment being the act of bankruptcy alleged. The plaintiff was appointed trustee in the bankruptcy, and received from the trustee under the deed about one-fifth of the money collected by the latter. In an action to recover the debt of the defendant from her, as a debt due to the estate of the bankrupt:—

*Held* that, in the absence of evidence that the debt of the defendant or some part of it had been paid over by the trustee under the deed to the plaintiff, there was no defence to the action.

Judgment of the King's Bench Division, [1905] 2 K. B. 528, affirmed.

APPEAL from the judgment of a Divisional Court, reported [1905] 2 K. B. 528.

The plaintiff was the trustee in bankruptcy of one William Watson, and he sued the defendant for the sum of 21*l.* in respect of work done for her by Watson. It appeared that Watson, being in financial difficulties, executed a deed of assignment dated June 5, 1903, of all his property to one Afford, on trust for sale, conversion and collection, and payment out of the net proceeds to the creditors of Watson rateably in accordance with the law of bankruptcy. Afford informed the defendant by letter that he had been appointed trustee under the above-mentioned deed of assignment, and required the defendant to pay 21*l.* to him, which she did. Afford collected other debts, the sum that came into his hands amounting to upwards of 500*l.* A petition in bankruptcy was presented against Watson alleging the execution of the deed of assignment of June 5, 1903, as an act of bankruptcy, and on August 20, 1903, a receiving order was made against him, and he was adjudicated a bankrupt and

the plaintiff was appointed trustee. The plaintiff required Afford to pay over the money collected by him, and a sum of 100*l.* was paid to the plaintiff.

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The plaintiff brought this action to recover the sum of 21*l.* from the defendant, who set up the payment to Afford as an answer to the plaintiff's claim.

The case was remitted to a county court, and judgment was given for the defendant, but an appeal by the plaintiff to a Divisional Court was allowed. (1)

The defendant appealed.

*F. Mellor*, for the defendant. The plaintiff, as trustee in bankruptcy of Watson, might have treated the assignee under the deed as his agent or as a wrong-doer: *Ex parte Vaughan* (2); but he cannot say that as to one part of the transaction the assignee was a wrong-doer and as to another part that he was agent. The plaintiff has received from the assignee a part of the money collected by the latter, and is entitled to an account of the value of the property that came into his hands. By accepting the money as money received to his use, he has validated the whole transaction, and he cannot be heard to say that the assignee was agent so far as the collection of a debt from one person was concerned, but not in relation to a similar collection from another person. As pointed out by Lindley M.R. in *In re Hirth* (3), the assignment is not void and of no effect, because, though it is an act of bankruptcy, the assignor may never be adjudicated a bankrupt upon it. That being the state of things in which this payment was made, and the trustee having accepted the assignee as his agent, the payment by the defendant to the agent is an answer to the claim in this action. In any event, the defendant is entitled to a deduction of one-fifth from the claim, that being the proportion that the amount paid to the trustee by the assignee bore to the amount, which was about 500*l.*, that he collected. That deduction would bring the amount that the plaintiff could recover below 20*l.*, and he would not be entitled to costs.

(1) [1905] 2 K. B. 528.

(2) (1884) 14 Q. B. D. 25.

(3) [1899] 1 Q. B. 612, at p. 621.



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[He referred to *In re Ely* (1), *Smith v. Baker* (2), and *In re Marion*. (3)]

S. R. Clarke, for the plaintiff, was not called on to argue.

COLLINS M.R. This is an appeal from a decision of a Divisional Court, who held that, under the circumstances of the case, there was no defence to the action.

It appears that a man of the name of Watson, who was a builder, was in difficulties, and executed a deed of assignment of all his property to a trustee, one Afford, for the benefit of the creditors. Certain debts were collected by Afford, including a sum of 21*l.*, which the defendant paid to him. Within three months from the execution of the deed of assignment Watson was made a bankrupt, and the trustee in bankruptcy now sues the defendant to recover the 21*l.* which she owed to Watson. The answer to this claim is that the defendant had already paid this debt to the assignee under the deed of assignment, and one question in the case is whether this is a good answer. The first point raised is that the trustee in bankruptcy has received from the assignee of the deed a sum of 100*l.*, which is said to represent one-fifth of the sum collected by the assignee under the deed, and that by doing so he has made the assignee his agent in respect of the whole transaction, and is estopped from suing the defendant for a debt which she has already paid to the assignee. This point involves the proposition that there can be only one election by the trustee, and that if he has adopted any part of the transaction carried out by the assignee, and thus adopted the assignee as his agent, he has debarred himself from treating him as a tort-feasor in other matters involved in the same transaction, and from the right to sue any debtor who has paid the assignee. In my opinion no such point can be maintained, and the fact that the assignee has received and accounted for some part of the debts due to the bankrupt does not alter the right of the trustee in bankruptcy as to third parties who are debtors to the estate. It was put to us in the course of the argument that the defendant had paid to the assignee of the deed the amount that she owed

(1) (1900) 48 W. R. 693.

(2) (1873) L. R. 8 C. P. 350.

(3) [1896] 1 Q. B. 140.

to Watson, and that the assignee had paid a larger amount to the trustee in bankruptcy, and therefore this action would not lie. That state of facts could only be made use of as a defence by shewing that the payment to the trustee was a payment over of the defendant's money. To treat it otherwise would be to carry the doctrine of election too far. That doctrine is that a person who has, as against another, elected to act upon one of two alternative views of his rights cannot, as against that other or any other person claiming under him, adopt the inconsistent and alternative view of his rights. But when dealing with third parties, not parties to the election, the same considerations do not apply. The mere fact that the trustee in this case elected to adopt some part of the transaction carried out by the assignee by taking over either money collected by him or some chattel handed to him, and to treat the money or chattel as part of the bankrupt's estate, does not affect the rights of the trustee in bankruptcy against third persons. Such an adoption is not evidence in itself of election, though it may be a link in a chain of evidence. In this case there is no evidence of an adoption by the trustee in bankruptcy of the assignee under the deed as agent, and the argument on this point fails.

A further point was raised that the sum of 100*l.* received by the trustee from the assignee of the deed was about one-fifth of the whole amount collected by the latter, and the defendant claims that a proportionate reduction of one-fifth should be applied to her debt so as to reduce it below 20*l.*, with consequences as to costs which would be for her benefit. Whether this should be done depends on whether the defendant can shew that the money she paid over is included in that 100*l.* The onus of proof was on her, and she has failed to give any evidence to shew that the plaintiff has already received any of her money. Upon these grounds I am of opinion that the judgment of the Divisional Court must be affirmed.

FLETCHER MOULTON L.J. I am of the same opinion. The execution of the deed of assignment was an act of bankruptcy, and if bankruptcy proceedings were taken within three months from the execution of the deed the deed would be void as against

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the trustee in bankruptcy. Anyone who under such an assignment exercises the right to collect and receive debts due to the assignor does so at his own peril, and anyone who recognizes the right of the assignee to receive a debt due to the assignor also does so at his own peril. If bankruptcy supervenes, the assignee under the deed becomes a trustee *de son tort*, as pointed out by Vaughan Williams L.J. in *In re Mardon* (1), and the trustee in bankruptcy has a right to demand from him all the assets that have come into his hands. In these circumstances a payment made to the trustee under the deed is a payment made to a wrong person, and the trustee in bankruptcy is entitled to sue the debtor to recover the debt. If the person so sued can shew that the trustee in bankruptcy has been paid the debt sued for, either in whole or in part, by receipt from the trustee of the deed of the whole or a part of the money that has thus been paid to him, that will be, *pro tanto*, an answer to the claim. Take the instance of a chattel, such as a carriage, which was in the hands of a bailee, and was demanded by the assignee as being the property of the bankrupt. If the carriage passed into the hands of the assignee, and was afterwards delivered to the trustee in bankruptcy, there could be no claim against the bailee. Similarly with regard to money, though there might be greater difficulty in tracing it. I am not prepared to say that, if the moneys received of the assignee got mixed together, it might not be permissible to separate a proportional sum as due to the receipt of a particular debt. But in the present case there is no evidence that the trustee in receiving the 100*l.* from the assignee received any portion of the 21*l.* paid by the defendant to the assignee. The onus of shewing this rested with the defendant, and no effective attempt was made to meet that onus, and there is therefore no defence to this action.

FARWELL L.J. I am of the same opinion. The trustee of the deed of assignment became trustee of a deed which he knew to be an act of bankruptcy, and he could not therefore be heard to say that it was not an act of bankruptcy, and one that might be avoided in three months, and he acted under it at his peril.

(1) [1896] 1 Q. B. 140, at p. 144.

When it was avoided he became, as Vaughan Williams L.J. put it, a trustee de son tort, and the trustee in bankruptcy could call on him to account. It is in my opinion impossible to say that if the trustee in bankruptcy does so call on him to account, it is an election by him to treat the trustee under the deed as his agent, so that a debtor to the estate can take advantage of that election, with the effect of preventing the trustee in bankruptcy from doing his duty to the estate of the bankrupt. If there were such an election, having such wide-reaching effects as has been contended, I should require to hear argument to satisfy me that it came within the powers of the trustee under s. 56 of the Act, and that it did not require the assent of the committee of inspection under s. 57; but it is unnecessary to consider that point, because it does not arise. The trustee in bankruptcy in this case has called upon the trustee de son tort to hand over the trust estate collected by him. That to my mind gives, to such of the debtors of the bankrupt as may have paid over money to the trustee de son tort, the right only, as against the trustee in bankruptcy, of following the assets into the hands of the trustee in bankruptcy, and tracing a particular asset and saying, "That is mine, and you cannot have it over again, as I have already paid." Since *In re Hallett's Estate* (1) it is well settled that money can be earmarked and traced as well as land or chattels, but it is incumbent on the person who claims the money to prove the steps by which he traces it, and that can only be done, as far as I know, in the case of money paid into a banking account, by the application of the rule in *Clayton's Case*. (2) There has been no effort to do anything of the sort in the present case, and, having regard to the dates, it appears to be almost incredible that it could be done, for the 21*l.* was paid in on June 12, 1903, and the 100*l.* was not paid out till September 3 of that year, and it seems most improbable that the rule in *Clayton's Case* (2) would not have wiped out the whole of the 21*l.* long before September 3; and there have also to be considered the rights of others in the same position as the plaintiff, as the moneys paid to the trustee de son tort amounted, as we are told, to over 500*l.* The result is that the appeal fails.

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(1) (1880) 13 Ch. D. 696.

(2) (1816) 1 Mer. 572, 605.



C. A. I do not think that anything we have said in any way touches  
 1906 the decision in *Ex parte Vaughan* (1), which depended on a  
 DAVIS different equity altogether; in that case the trustee in the  
 v. bankruptcy, in his account against the trustee de son tort, took  
 PETRIE. advantage of the exertions and efforts of the latter, but refused  
 Farwell L.J. to defray the costs of the realization of, or such costs as were  
 incident to, the recovery of the asset which was in question,  
 and it was rightly held that those costs must be allowed.

*Appeal dismissed.*

Solicitors for plaintiff: *Braby & Macdonald.*

Solicitors for defendant: *Gerald & Arthur Marshall.*

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July 23;  
 Aug. 7, 9.

*Ship—Charterparty—Bill of Lading—Duty of Master to Sign—Bill of Lading at Variance with Charterparty—Liability of Shipowner to Holder of Bill of Lading—Indemnity by Charterer.*

The defendants chartered the plaintiffs' ship to load a cargo of rice at Rangoon for delivery at Rio de Janeiro. The charterparty contained a negligence clause, and provided that the master should sign clean bills of lading at any rate of freight without prejudice to the charterparty. The ship was to be consigned to the defendants at Rangoon, and they were to receive an address commission of 2½ per cent. on the amount of the freight. The defendants at Rangoon presented bills of lading to the master for his signature, which he signed. The bills of lading contained no negligence clause, but the master and the defendants believed, wrongly, that the charterparty negligence clause was incorporated into the bills of lading. On the voyage to Rio de Janeiro the ship stranded through the negligence of the master, causing a loss of cargo, in respect of which the holders of the bills of lading recovered judgment against the plaintiffs, who, in this action, claimed an indemnity from the defendants:—

*Held*, that the defendants in presenting the bills of lading for the master's signature were not acting as ship's agents, and were, therefore, not liable for negligence or breach of duty in that capacity; but that, having represented to the master that the bills of lading were in a form

which, under the charterparty, he was bound to sign, they were liable to indemnify the plaintiffs against the consequences of the master's having signed bills of lading, which in fact involved the plaintiffs in a liability to third persons from which the plaintiffs were exempted by the terms of the charterparty.

*Sheffield Corporation v. Barclay*, [1905] A. C. 392, applied.

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ACTION in the commercial list tried by Phillimore J. without a jury.

By a charterparty dated April 22, 1903, the defendants chartered the plaintiffs' ship the *Invermore* to load a cargo of rice at Rangoon, and being so loaded, to proceed thence to Rio de Janeiro, and there deliver the cargo. The material clauses of the charterparty were as follows:—

"6. The act of God, perils of the sea, fire, barratry of the master and crew, the King's enemies, pirates, arrests and restraints of princes, rulers and people, collisions, stranding and other accidents of navigation excepted, even when occasioned by negligence, default or error in judgment of the pilot, master, mariners, or other servants of the shipowners.

"7. The master to sign clean bills of lading for his cargo, also for portions of cargo shipped (if required to do so) at any rate of freight, without prejudice to this charter, but not at lower than chartered rates, unless the difference is paid to him in cash before signing bills of lading.

"18. The necessary cash, if required by the master for ship's disbursements, to be advanced by charterers or their agents to the master at loading port, say up to 500*l.* on account of freight, at the exchange of one penny per rupee above the rate for six months' sight documentary bills on London, the same to be endorsed on bills of lading, including cost of insurance and 2½ per cent. commission, and deducted from freight on settlement thereof, and for the due appropriation of which charterers or their agents shall not be held responsible.

"19. The ship to be consigned at loading port to charterers or their agents, and to pay them there a commission of 2½ per cent. on the estimated gross amount of freight on the cargo taken on board, and in the event of the vessel, during the progress of her voyage from loading port to port of discharge, being obliged to put back, or to put into any port or ports, in case of accident

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or distress, the consignment of the cargo to be placed in the hands of the charterers' agents."

The *Invermore* loaded a cargo of rice at Rangoon, and the defendants presented to the master for his signature bills of lading in the printed form used by the defendants, which provided that the cargo was to be delivered at Rio de Janeiro, "the act of God, the King's enemies, fire and all and every other dangers and accidents of the seas, rivers and navigation of whatever nature and kind soever excepted, unto order or its assigns, freight for the said goods and all other conditions as per charterparty dated London, April 22, 1903." The master signed the bills of lading in the form presented to him, both he and the defendants believing that the words "all other conditions as per charterparty" incorporated into the bills of lading the exception as to negligence from the charterparty; but in fact that was not so: see *Serraino v. Campbell* (1); *Diederichsen v. Farquharson*. (2)

In the course of the voyage from Rangoon to Rio de Janeiro the *Invermore* stranded through the negligence of the master, and the ship and cargo became a total loss.

By reason of the bills of lading containing no negligence clause the holders of the bills of lading recovered judgment against the present plaintiffs in the Admiralty Court in respect of the loss of the cargo, the damages being assessed under the provisions for the limitation of liability at 12,175*l.* 12*s.*

The plaintiffs in their points of claim alleged that under clause 19 of the charterparty the defendants became and were the ship's agents at the loading port, and that it was the defendants' duty as charterers, and as the ship's agents, to present to the master for signature bills of lading in accordance with the terms of the charterparty, and that the defendants, in breach of their said duty, presented to the master for signature bills of lading which did not incorporate the exception "stranding and other accidents of navigation excepted, even when occasioned by negligence of the master."

The plaintiffs claimed an indemnity against the amount payable by them to the holders of the bills of lading by way of damages and costs.

(1) [1891] 1 Q. B. 283.

(2) [1898] 1 Q. B. 150.

The defendants in their points of defence denied that either as charterers or under clause 19 of the charterparty they were under any duty to the plaintiffs with regard to the form of the bills of lading; further, that the damages were not caused directly or at all by any act or default of the defendants.

On behalf of the defendants several merchants, shipowners and shipbrokers, familiar with the course of business both in Rangoon and in London, gave evidence. They stated that the bills of lading were in the form ordinarily used at Rangoon. They entirely disagreed with the contention that the effect of clause 19 of the charterparty was to make the charterers the ship's agents. The reason for the practice of consigning a ship to the charterer was to give him control over the entry and clearance of the vessel, and with that exception the charterer had nothing to do with the ship's business. The 2½ per cent. address commission was really a discount on the freight, and on the sale of rice cargoes to buyers in South America the buyers almost invariably stipulated as part of the contract that they should receive the address commission paid by the ship.

No evidence was given on behalf of the plaintiffs on this point.

*Scrutton, K.C.*, and *Bailhache*, for the plaintiffs. The charterparty provided that the master was to sign clean bills of lading at any rate of freight without prejudice to the charterparty, and it was the duty of the defendants to present bills of lading for his signature which were not at variance with the charterparty. Even if the master had known, which he did not, that bills of lading in this form did not incorporate the exception of negligence, he would have been bound to sign the bills of lading: *Hansen v. Harrold* (1), per Lord Esher M.R.; *Rodocanachi v. Milburn*. (2) In presenting for signature bills of lading in this form the defendants committed a breach of their duty as charterers, and are liable to indemnify the plaintiffs for the loss incurred by reason of that breach. Further, it is submitted that the effect of clause 19 of the charterparty was to constitute the defendants the ship's agents at Rangoon, and they were guilty of negligence in that capacity.

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(1) [1894] 1 Q. B. 612, at p. 619.

(2) (1886) 18 Q. B. D. 67.



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*J. A. Hamilton, K.C., and Montague Lush, K.C. (A. H. Chaytor with them), for the defendants.* The uncontradicted evidence given on behalf of the defendants completely disposes of the suggestion that the defendants were the ship's agents at Rangoon for the purpose of presenting the bills of lading for signature. An agency of that sort would be very unusual, since the interests of charterers and shipowners are to a certain extent antagonistic. There is no evidence of any negligence on the defendants' part. Their duty, whether as ship's agents or as charterers, was fulfilled by presenting bills of lading in a form regularly used in the trade. It is a fallacy to say that merchants at Rangoon must know the law. That may apply to the criminal law, but it was not negligence for the defendants to put a mistaken construction on the language of a commercial document, especially when the Court of Appeal in construing similar language in *Diederichsen v. Farquharson* (1) differed as to its meaning. A right to an indemnity can only be implied if it was necessary in order to carry out the purposes of the contract: *Ex parte Ford*. (2) There is no ground here for implying a right to an indemnity. The master was not bound to sign the bills of lading as presented, if, as the fact was, they contained provisions at variance with the charterparty: *Hansen v. Harrold* (3), per Davey L.J. He did in fact sign them without protest. If the bills of lading had been presented to the shipowners themselves for signature, they would have had either to sign or to reject them at their peril, and their agent the captain cannot stand in any better position. In the absence of bad faith or of some term in the charterparty prescribing the precise form of bill of lading, as there was in *Hansen v. Harrold* (3), the master was only bound to sign a bill of lading which should ultimately prove to be a clean bill of lading.

[PHILLIMORE J. referred to *Sheffield Corporation v. Barclay*. (4)]

In *Sheffield Corporation v. Barclay* (4) the plaintiffs were merely acting in a ministerial capacity, and there was default on the part of the bank in the sense that the bank had a greater opportunity than the corporation had of ascertaining whether the

(1) [1898] 1 Q. B. 150.

(2) (1885) 16 Q. B. D. 305.

(3) [1894] 1 Q. B., at p. 621.

(4) [1905] A. C. 392.

transfer was properly executed or not. There is no analogy between the relative positions of the corporation and the bank in that case and of the charterers and the master of a ship to whom a bill of lading is presented for signature. [They also referred to *Brown v. Powell Dufryn Steam Coal Co.* (1) and *Stumore v. Breen.* (2)] The damage suffered by the plaintiffs was not the result of the master's signing bills of lading in this form, but of his negligence, whereby the ship was stranded and the cargo was lost.

*Scrutton, K.C.*, in reply. The defendants for their own purposes tendered bills of lading to the master for his signature, and the consequence of his signing them in the form presented was to impose upon the plaintiffs a liability for negligence, from which they were exempted by the terms of the charterparty. If the view expressed by Lord Esher M.R. in *Hansen v. Harrold* (3) is correct, the master was bound to sign the bills of lading, but even if there was no absolute duty on him to do so, he was nevertheless, in the words of Lord Davey in *Sheffield Corporation v. Barclay* (4), called upon to perform a contractual duty of a ministerial character, and acted without any default on his own part. Whichever view be adopted, the case comes within the rule as to an implied indemnity laid down in that case and in *Birmingham and District Land Co. v. L. & N. W. Ry. Co.* (5), and *Dugdale v. Lovering.* (6) Assuming that the plaintiffs are entitled to an indemnity, *Milburn v. Jamaica Fruit Importing and Trading Co.* (7) is a complete answer to the contention that the damage was not the result of the master's signing bills of lading in this form. The only difference between the two cases is that there the indemnity was express, here it is implied.

*Cur. adv. vult.*

Aug. 9. PHILLIMORE J. read the following judgment:—This case discloses startling divergencies between the views and practice of men of business and the law as administered by the

(1) (1875) L. R. 10 C. P. 562.

(2) (1886) 12 App. Cas. 698.

(3) [1894] 1 Q. B., at p. 619.

(4) [1905] A. C., at p. 399.

(5) (1886) 34 Ch. D. 261.

(6) (1875) L. R. 10 C. P. 196.

(7) [1900] 2 Q. B. 540.

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Courts. Considering the efforts that have been made by the Courts to keep in touch with commercial matters and abreast of the conditions of business, and, as I should have said, by commercial men to keep themselves informed of the decisions of the Courts, the divergencies are surprising. The point arises in this way. The plaintiffs let their ship to the defendants on a charterparty, under which she was to load a cargo at Rangoon to be carried to and delivered at Rio de Janeiro subject to certain perils, one of such perils being accidents of navigation, even if due to the negligence of the master. The master was to sign clean bills of lading as presented without prejudice to the charterparty at any rate of freight, but not at lower than chartered rates, unless difference was paid before signing. The ship was to be consigned to the defendants at Rangoon, and they were to receive an address commission of  $2\frac{1}{2}$  per cent. Also in the event of her putting into a port of distress the cargo was to be consigned to the defendants' agents. The master might if he so desired (as it happened he did not) require an advance up to 500*l.* from the defendants for the disbursements at Rangoon on the usual terms as to interest and insurance. These are all the material provisions. The ship was loaded, and the defendants presented to the master bills of lading, which contained a very limited clause as to excepted perils, omitting in particular the negligence clause, but which had also the words "freight and all other conditions as per charterparty, dated London, April 22, 1903." It appears that the defendants had a rubber stamp with which they could put on the negligence clause, but were not in the habit of putting it on unless asked, because, as they said, some shipmasters objected; that sometimes they found shipmasters carrying their own stamps and putting on the negligence clause themselves; and that in these circumstances they were content to go on printing forms of charterparty and bill of lading, each bearing their own names with a clause as to excepted perils in the first much wider than the similar clause in the second. The explanation given was that it was supposed that the words in the bill of lading "all other conditions as per charterparty" incorporated for all purposes every exception in the charterparty. Why, if so, there should be any exception in the bill of lading

was not explained. However, the master, who was examined before me, had the same opinion. All he asked when the bill of lading was presented to him was whether it contained the clause of incorporation, and he thought that if it did the negligence clause became part of the bill of lading.

Now the startling fact is that a series of cases, beginning with *Russell v. Niemann* (1), and culminating in *Serraino v. Campbell* (2), decided on this very negligence clause as long ago as 1891, and *Diederichsen v. Farquharson* (3), have settled that this clause of incorporation has no such effect when the bill of lading gets into other hands than those of the charterers. It is also somewhat startling that a further reason why all parties at Rangoon were not particularly careful in this matter is that the negligence clause has become in the last twenty years (I fix the date from my own experience) so common in English shipping documents that English men of business have almost forgotten the common law of England and of most civilized countries, and it does not enter into their heads that a cargo-owner may sue the shipowners for damages for negligent navigation. It was even suggested that underwriters have so given up reclaiming on being subrogated to the cargo-owners and suing the ship that it makes no difference in the rate of premium on cargo whether there is or is not a negligence clause in the bill of lading. However, the unexpected happened. The ship struck on a reef, and was totally lost with her cargo. The holder of the bill of lading, or his underwriters, took what I could see many of the plaintiffs' witnesses thought to be a mean advantage of the omission of the negligence clause in the bills of lading—proved negligent navigation by the master and recovered judgment against the shipowner for the sum of upwards of 18,000*l.*, which can be reduced by the provisions for limitation of liability to something over 12,000*l.* For this sum the shipowners sue the defendants, claiming that they are liable either for negligence in presenting and procuring the signature of the master to a bill of lading without the negligence clause or upon an implied contract by them to indemnify the shipowners against the consequences of

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(1) (1864) 17 C. B. (N.S.) 163.

(2) [1891] 1 Q. B. 283.

(3) [1898] 1 Q. B. 150.



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the master signing a document which they procured him to sign.

With regard to the claim for negligence, it cannot arise unless the defendants had some duty in this respect to the shipowners. They had no such duty as charterers, and after consideration I am of opinion that they had no such duty as agents. It is true that the vessel was to be consigned to them, and that they were to have an address commission. Such commission was, I imagine, in early days a benefit to the charterers. It may have been even something in the way of profit out of freight made by the sellers behind the back of the purchasers. But address commission is now so common that all business men know of it. It is rather discount than remuneration for agency; and in the particular trade the intelligent gentlemen of South America see that the buyers get it. The charterers do get a benefit from having the ship consigned to them, but only in this way. They get a certain control over the ship and regulate the clearances. And it seems that the only service which is expected of them in return is to enter and clear the ship free of charge. There seems a trace of a survival of the old idea of giving some pecuniary benefit to the charterers through the medium of an agency in the clause making them agents at the port of distress. But at the port of loading their benefits and their duties, at any rate in this trade, seem to be confined within the narrow limits which I have mentioned. This being so, I do not think that they were acting as ship's agents when they presented or allowed to be presented the bills of lading. The only way in which their position as agents for certain purposes comes into this case is that I must remember that when as charterers they presented the bills of lading they knew that the master had no agent with whom to advise. I should add that if I thought the charterers had any duty as ship's agents here I should have no hesitation in finding that they neglected it. To have a printed form of charter, no doubt usual in the trade, but which you accept and print in your own name, and then to prepare your own bill of lading bearing your own name with a clause of excepted perils so that you do not apparently rely wholly upon the excepted perils in the charter-party, and yet to have a clause so far short of that in the

charterparty, to treat the insertion of the negligence clause or its absence as a quite unimportant matter, stamping it on when asked, allowing captains to stamp it on when they pleased, and omitting it when not asked just as if it made no difference, seems to me conduct as casual and careless as can well be imagined. Still, if they had no duty the charterers might be as careless as they pleased.

Then comes the plaintiffs' other way of making out their claim. It is put thus:—The charterers tendered a bill of lading; it is for their interest, not the shipowners', that there is a bill of lading; the master must either sign any bill of lading which is presented to him (which seems to be the opinion of Lord Esher in *Hansen v. Harrold* (1) and possibly of Lord Davey), or he must at least justify a refusal. It turns out that the bill of lading which the charterers invited the master to sign is one which will involve his owners in a liability which they ought not to be asked to incur. Are not the shipowners entitled to an indemnity against this liability? The law is laid down by Cotton L.J. in the case of *Birmingham and District Land Co. v. L. & N. W. Ry. Co.* (2): "If A. requests B. to do a thing for him, and B. in consequence of his doing that act is subject to some liability or loss, . . . the law implies a contract by A. to indemnify B. from the consequence of his doing it." It is to be observed that in this statement of the law there is no reference to the consideration that the liability or loss may be due to the fact that what B. does at A.'s request is an injury to C. In the simple case no such consideration arises. A. may be asking B. as his agent to contract as a principal with C., or he may be a cestui que trust asking his trustee to invest in shares not fully paid up. But in several of the cases where an indemnity has been implied the act which B. does at A.'s request is an injury to C. Public policy then has to be considered. A conspiracy between A. and B. to injure C. gives B. no right of action against A. when C. turns the tables on him. Hence to allow B. to have an indemnity, the act, though in fact injurious to C., must be, as far as B. knows at the time, innocent. Hence arises the qualification that it must not have

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(1) [1894] 1 Q. B., at pp. 619, 621.

(2) 34 Ch. D. 261, at p. 272.

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been "manifestly tortious to his knowledge," as stated in *Dugdale v. Lovering* (1), and accepted by the Lord Chancellor in *Sheffield Corporation v. Barclay*. (2) I think that Lord Davey's words "without any default on his own part" are intended to convey the same idea. Hence also possibly the insistence in that case that B. must be under a duty imposed by common law or statute to do that which upon the facts as he then knows them A. can rightly require him to do. But when, as in this case, that which the charterers asked the shipowners by their master to do involved no injury to a third party, but merely rendered them subject to some liability or loss, the first of the two conditions which I have mentioned is certainly not needed. I doubt whether the second is. But to this point I will return. The case before me would have been like *Dugdale v. Lovering* (1) and *Sheffield Corporation v. Barclay* (2) if the shipowners had made the master repay them what they had to pay to the cargo owners and the master had then sued the charterers for an indemnity, because they had induced him to injure a third party—namely, his owners—by signing an insufficient bill of lading. In such an action the master would have to have shewn that "the act was not manifestly tortious to his knowledge" or had been done "without any default on his own part." Whether in that event he could have successfully relied on his ignorance of the law and whether misconstruction of a bill of lading is ignorance of law are matters which it is not necessary to discuss. This case is not that case. I have said that I doubt whether it is essential to an indemnity in a case like the present that B. should have been called upon by A. in virtue of some duty, whether imposed by common law or statute or private contract does not matter. But if it is essential it seems to me that such a duty was invoked. The provision in such charterparties as this that the master shall sign bills of lading without prejudice to the charterparty has, as I have said, received a construction which may make it compulsory upon him to sign any bill of lading tendered to him by the charterers (except, of course, a bill of lading which incorrectly stated the character or quantity of the goods shipped under it). Even if he be not compelled to

(1) L. R. 10 C. P. 196.

(2) [1905] A. C. 392.

sign any bill of lading, there is some form of bill of lading which he is bound to sign, and the charterers represented to him that this form was that form. He accepted their statement. His contractual duty was invoked. I do not see that the charterers can complain that he did not know that it was wrongly invoked.

The last point taken by the defendants is that the loss which the shipowners have suffered is not due to the master signing an insufficient bill of lading, but to his subsequent negligent navigation. The case of *Milburn v. Jamaica Fruit Importing and Trading Co.* (1) is a direct authority against this contention. There the indemnity was express; here I hold it to be implied. Once get the indemnity, and the consequences are the same. But I should need no authority to reject this contention. The shipowner had a right to be protected against the negligence of his servant. This was what he stipulated for. The excepted peril in question was not a loss by an accident of navigation. It was a loss by an accident of navigation brought about by the negligence of the master. If a shipowner had commissioned an insurance broker to effect for him an insurance against such an accident, and the broker had omitted to do so, and the cargo had been lost, the broker could not have said to him: "The loss to you is not due to my carelessness, but to the bad navigation of your master." The argument rests upon a confusion between two losses, the loss of the cargo and the loss in money to the shipowner. Upon the whole I give judgment for the plaintiffs for the amount of their limit of liability at 8*l.* per ton, with interest, and for the costs of the limitation action and the costs of this action.

*Judgment for plaintiffs.*

Solicitors for plaintiffs: *Holman, Birdwood & Co.*

Solicitors for defendants: *Hollams, Sons, Coward & Hawksley.*

(1) [1900] 2 Q. B. 540.



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JAMES NELSON & SONS, LIMITED v. NELSON LINE  
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July 24;  
Aug. 11.

*Ship—Contract of Carriage—Liability of Shipowner—Exceptions—Unseaworthiness—Damage capable of being covered, or which has been paid for, by Insurance.*

The plaintiffs shipped frozen meat on board the defendants' steamer for carriage to the United Kingdom upon the terms of an agreement which contained numerous exceptions exempting the defendants from liability for, inter alia, unseaworthiness or unfitness of ship (whether caused by the defendants' neglect or not), "provided all reasonable means have been taken to provide against unseaworthiness"; "the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance, or which has been wholly or in part paid for by insurance." The ship was not fit to carry the cargo, which was in consequence damaged. Through the neglect of the defendants reasonable means had not been taken to prevent the unfitness. The plaintiffs were partially covered by insurance, and had been paid the insured proportion of the loss.

*Held*, that, the defendants having failed to take reasonable means to provide against the unfitness of the ship, the fact that the damage had been in part paid for by insurance did not exempt the defendants from liability.

*Price v. Union Lighterage Co.*, [1904] 1 K. B. 412, followed.

ACTION in the commercial list tried by Bray J. with a special jury.

The plaintiffs claimed damages for the breach of an agreement dated June 18, 1904, between themselves as charterers, and the defendants as owners, for the carriage of the plaintiffs' frozen meat in the insulated chambers of steamers belonging to the defendants from the River Plate to the United Kingdom. The material clauses of the agreement were as follows:—

"6. On arrival of each steamer at her loading berth in the River Plate notice shall be given to the charterers or their agents in writing of her readiness to load. Such notice shall not be given until the temperature of the insulated chambers for frozen meat and offal shall have been reduced to at least 22 degrees Fahrenheit and the temperature shall be maintained thereat or lower up to the time of shipment commencing. During the time that frozen meat and offal are being received

on board, the owners are to take care to preserve as low as possible a temperature in the chambers and in no case during stowing shall it unless prevented by breakdown of machinery or other exceptions mentioned in Article 10 hereof be permitted at over 25 degrees Fahrenheit. The charterers shall not be bound to load any frozen meat or offal while the temperature is above 25 degrees Fahrenheit and any time so lost shall not count as lay days. After completion of the shipment the frozen meat chambers shall unless prevented as above mentioned be kept at a temperature not exceeding 25 degrees Fahrenheit until all the meat is discharged at port or ports of destination. The aforesaid notice of readiness shall be left at the office or place of business of the charterers in the River Plate between the hours of 10 a.m. and 4 p.m. Twelve hours after the receipt of such notice the lay days of the steamer shall commence provided the aforesaid temperature of 22 degrees Fahrenheit shall have been maintained in the insulated chambers set apart for frozen meat and offal since the beginning of such notice or as soon thereafter as the temperature may have been maintained at that temperature for a period of twelve hours. . . .

"10. The owners are not to be liable for any loss damage prejudice or delay wherever or whenever occurring caused by the act of God the King's enemies pirates robbers thieves whether on board or not by land or sea and whether in the employ of the owners or not barratry of master or marines adverse claims restraint of princes rulers and people strikes or lock-outs or labour disturbances or hindrances whether afloat or ashore or from any of the following perils viz. insufficiency of wrappers rust vermin breakage evaporation decay sweating explosion heat fire before or after loading in the ship or after discharge and at any time or place whatever bursting of boilers nor for unseaworthiness or unfitness at any time of loading or of commencing or of resuming the voyage or otherwise and whether arising from breakage of shafts or any latent defect in hull boilers machinery equipment or appurtenances refrigerating or electric engines or machinery or in the chambers or any part thereof or their insulation or any of their appurtenances or from the consequences of any damage or injury thereto however

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such damage or injury be caused provided all reasonable means have been taken to provide against unseaworthiness collision stranding jettison or other perils of the sea rivers or navigation of whatever nature or kind and howsoever such collision stranding or other perils may be caused and the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance nor for any claim of which written notice has not been given to the owners within forty-eight hours after date of final discharge of steamer. The above-mentioned exceptions shall apply whether the same be directly or indirectly caused or shall arise by reason of any act neglect or default of the stevedores master mariners pilots engineers refrigerating engineers tug boats or their crews or other persons of whatsoever description or employment and whether employed ashore or abroad or otherwise for whose acts or defaults the owners would in anywise in connection with the execution of this charter otherwise be responsible. . . .

"12. The owners shall unless prevented by exceptions enumerated in article 10 hereof subject the meat to the same treatment whilst in their charge that they have hitherto done but they shall not be responsible for its condition or for damage if any however caused. . . .

"18. When the steamer is ready to take in meat each voyage in the River Plate [*sic*] the charterers have liberty to inspect and satisfy themselves that the refrigerating machinery and insulation are in good working order and condition. The owners further undertake on any voyage when required by the charterers to have the refrigerating machinery and insulation of any steamer surveyed before the meat is taken on board by Lloyd's agent if available or if not available by some other surveyor to be nominated by him or failing appointment by him to be agreed upon by the parties and to supply the charterers if required with the agent's or surveyor's certificate that the said machinery and insulation are in proper working order and condition. The owners will in addition provide and pay engineers competent to work and keep the machinery in proper working order but the owners are not to be responsible for any defect deficiency or breakdown in the

insulation or machinery or anything connected therewith or appertaining thereto however caused and whether existing before or after the shipment of the meat or the commencement or any resuming of the voyage or for any act default or neglect of engineers firemen stevedores labourers or other persons for whom they would otherwise be responsible. The protection given by this article to the owners is intended to be in addition to that given by article 10 but is subject to the proviso as to taking means to prevent unseaworthiness therein contained. . . .

"22. The Nelson Line or River Plate Conference bills of lading are hereto attached, and their clauses are to form part of this agreement, except where such clauses are inconsistent with the clauses of this contract. The master to sign bills of lading as presented, referring for conditions of carriage, freight, &c., to this charterparty, and such bills of lading are given without prejudice hereto."

The Conference bills of lading contained the following clause : "Claims, if any, for loss by damage or short delivery, or otherwise, arising out of this bill of lading to be settled direct with the owners in Liverpool according to English law, to the exclusion of proceedings in the Courts of any other country. Owners not accountable in any case beyond net invoice price of the goods damaged or short-delivered."

In March and April, 1905, the plaintiffs shipped on board the defendants' steamship, the *Highland Chief*, a cargo of frozen meat for carriage to London on the terms of the agreement. The plaintiffs alleged that the meat was not carried safely, but arrived as to a great portion in a soft and mouldy condition and drenched with brine; that the temperature of the insulated chambers in which the meat was carried was not maintained during stowage at as low a temperature as possible, and was permitted during stowage and after shipment at over 25 deg. Fahrenheit, though not prevented by any of the exceptions mentioned in the agreement, whereby the meat was damaged; and, further, that the ship was unseaworthy, and that the defendants did not take all reasonable means to provide against unseaworthiness.

The defendants admitted that the cargo had been damaged by

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the temperature not being kept sufficiently low, which they contended was due to the negligence of the engineers. The defendants alleged that they had taken all reasonable means to provide against unseaworthiness. They relied on the exceptions in the agreement as exempting them from liability for the damage.

The plaintiffs had insured the cargo to the extent of 75 per cent. of its value, and after this action had been commenced the underwriters had paid them a sum representing 75 per cent. of the loss.

The jury, in answer to the questions left to them, found that the *Highland Chief* was at the commencement of the voyage unfit to carry the cargo of frozen meat to its destination; that all reasonable means were not taken to prevent the unfitness; that the neglect was that of the defendants, their officers and agents; that the whole of the damage was caused by the unfitness of the ship, and that no damage was done during the period of loading or before the commencement of the voyage. The jury assessed the damages at 23,900*l*.

The questions of law arising on the findings of the jury were reserved for further consideration.

*J. A. Hamilton, K.C.*, and *Bailhache (Pickford, K.C.*, with them), for the defendants. In spite of the findings of the jury, the defendants are exempted from liability by reason of the provision in clause 10 of the agreement as to "the owners not being liable for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance." The meaning of the agreement is that the defendants are not to be liable for damage caused by any of the expressly excepted perils, and further that they are not to be liable even in the event of damage due to causes other than those specified if the particular damage was capable of being insured against or has been wholly or in part paid for by insurance. Therefore, the plaintiffs, having been paid a loss by their underwriters, cannot succeed in this action against the defendants. The insurance clause is one to which some effect must be given, but if the words are to be read as

subject to any such limitation as may be implied with regard to the excepted perils, namely that they apply only in the case of a seaworthy ship and in the absence of negligence, then the provision as to insurance carries the other exceptions no further, and is unnecessary. *Price v. Union Lighterage Co.* (1) and *Sutton v. Ciceri* (2) are distinguishable, because both those cases were decided in accordance with the principle laid down in *Steel v. State Line Steamship Co.* (3) and other cases, that if a shipowner desires to free himself from his obligation to provide a seaworthy ship the intention must be clearly expressed. In the present case the parties have agreed, in language which is perfectly plain and incapable of any other interpretation, that a loss which can be covered, or has been paid for, by insurance shall not be recoverable from the defendants, and there is no reason why the application of that part of the agreement should depend on the question whether the ship was or was not seaworthy. The language of the exceptions in clauses 10, 12 and 18 of the agreement is so wide as to exclude the limitations which were placed by implication on the insurance clause in *Sutton v. Ciceri* (2) and *Price v. Union Lighterage Co.* (1), and there is therefore no possibility of limiting this insurance clause as was done in those cases. Further, it is by no means certain that *Price v. Union Lighterage Co.* (1) would not have been decided the other way if the contract there had contained the words "any damage which has been paid for by insurance," for, assuming that the meaning of the words "capable of being covered by insurance" is open to doubt, and that those words must therefore be read subject to a limitation, no exception can be engrafted on to the latter part of the clause, which admits of no double interpretation, and raises the simple question of fact as to whether the loss has been paid for by insurance. The American cases *Phoenix Insurance Co. v. Erie and Western Transportation Co.* (4), *Inman v. South Carolina Ry. Co.* (5), and *The Titania* (6) support the defendants' contention.

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(2) (1890) 15 App. Cas. 144.

(3) (1877) 3 App. Cas. 72.

(4) (1886) 117 U. S. Rep. 312.

(5) (1889) 120 U. S. Rep. 128.

(6) (1883) 19 Fed. Rep. 101.

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In any event, under the clause in the bill of lading which is incorporated into the agreement, the amount of damage recoverable is to be the net invoice price of the goods. That means the cost price at which the shippers invoiced the goods to the plaintiffs, and does not include the freight.

*Scrutton, K.C.*, and *J. R. Atkin (Isaacs, K.C., with them)*, for the plaintiffs. A long series of authorities, the most recent being *Elderslie Steamship Co. v. Borthwick* (1), *Rathbone v. MacIver* (2), and *Owners of Cargo on board S.S. Waikato v. New Zealand Shipping Co.* (3), has decided that in construing a contract of affreightment a shipowner is not to be relieved of his two fundamental obligations, viz., to use reasonable care in carriage and to provide a ship fitted to carry the particular cargo, unless he uses clear and unambiguous language to that effect. It was on that principle that *Price v. Union Lighterage Co.* (4) was decided. It was contended there that water entering a vessel by the negligence of the crew was an ordinary peril of the sea capable of being covered by insurance, but *Walton J.* and the Court of Appeal held that, as the language of the contract might refer to matters which were not caused by negligence as well as to matters which were caused by negligence, in the absence of plain language to the contrary the former construction must prevail. The same principle governs this case, where the question is whether the words apply to an unseaworthy ship. It was also expressly decided in *The Glenfruin* (5) that exceptions in a bill of lading do not apply to a vessel not seaworthy at the time of sailing. Here there is the exception of unseaworthiness "provided all reasonable means have been taken to provide against unseaworthiness," and the jury have negatived that, but the defendants seek to use the general words of the provision as to insurance to reintroduce the exception of unseaworthiness. They have not used the clear unambiguous language which the authorities shew must be employed for that purpose, and therefore cannot claim exemption from the liability which the findings of the jury impose upon them.

(1) [1905] A. C. 93.

(2) [1903] 2 K. B. 378.

(3) [1899] 1 Q. B. 56.

(4) [1903] 1 K. B. 750; [1904] 1 K. B. 412.

(5) (1885) 10 P. D. 103.

With regard to the question as to the amount of damages, the clause in the bill of lading, if it applies at all, only applies if the ship was seaworthy: *Tattersall v. National Steamship Co.* (1) But the clause only applies to claims arising out of the bill of lading, whereas the plaintiffs' claim arises, not out of the bill of lading, but out of the agreement. The limitation as to damage is only intended to exclude loss of market or loss of profit. In the case of goods shipped to England, net invoice price must include cost, freight, and insurance.

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*Bailhache*, in reply, referred to *Morris v. Oceanic Steam Navigation Co.* (2)

*Cur. adv. vult.*

Aug. 11. BRAY J. read the following judgment:—In this case the plaintiffs claimed damages for breach of an agreement between themselves and the defendants dated June 18, 1904. This agreement provided for the carriage by sea by one of the defendants' line of steamers of a series of cargoes of frozen meat from the River Plate to the United Kingdom, and the breach alleged was that the defendants had failed to keep the temperature in the insulated chamber of the *Highland Chief* down to 25 deg. Fahrenheit during its voyage to the United Kingdom from April to June, 1905, whereby the cargo of frozen meat belonging to the plaintiffs was greatly damaged. The defence was that the damage was caused by exceptions mentioned in art. 10 of the agreement. The case was tried before me with a special jury on various days between July 2 and 14, and on the latter day the jury found by their verdict in effect that the *Highland Chief* at the commencement of the voyage was unfit to carry the cargo of frozen meat safely to its destination, that reasonable means were not taken to prevent such unfitness, that the neglect was the neglect of the owners, and that the damage was 23,900*l.* These findings appear to me clearly to entitle the plaintiffs to judgment, subject to two points which were reserved for me to deal with as being points of law, and these are the points I have now to decide.

The first was that under art. 10 the owners, i.e., the defendants,

(1) (1884) 12 Q. B. D. 297.

(2) (1900) 16 Times L. R. 533.



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were not to be liable for any damage to the goods capable of being covered by insurance, or which had been wholly or in part paid for by insurance. The second was that the clauses of the Conference bill of lading attached or stated in art. 22 to be attached to the agreement were to form part of the agreement, and that under one of those clauses the owners were not to be accountable in any case beyond the invoice price of the goods damaged, which was stated to be less than 23,900*l*.

With reference to the first point, the plaintiffs contended that the owners were not exempted in the case of damage caused by unseaworthiness or unfitness at the commencement of the voyage when reasonable means had not been taken to prevent such unfitness. There is no doubt that it is well settled law that in shipping documents of this character the exceptions do not affect the obligation of the shipowner to provide a ship fit for the cargo at the commencement of the voyage unless it clearly appears from the document that this was the intention of the parties: see *Steel v. State Line Steamship Co.* (1) and *The Glenfruin*. (2) I think that all the exceptions in art. 10, including the one in question, are exceptions which come within this rule. Article 6 provides that the owners are liable if they fail to keep the temperature down, unless prevented by the exceptions mentioned in art. 10, and this is one of the exceptions mentioned in art. 10. I can see no reason why the rule should not apply here. But the case is to a great extent covered by authority. In *Price v. Union Lighterage Co.* (3) it was held that a clause providing that "rates charged by us are for conveyance only, and we will not be liable for any loss of or damage to goods which can be covered by insurance," did not exempt the shipowner from liability for loss or damage caused by the negligence of his servants. There are, no doubt, additional words here, "or which has been wholly or in part paid for by insurance," but if the earlier part of the clause is subject to the warranty of seaworthiness, why should not these be? You cannot divide the clause and say that part is subject to the warranty, and not the rest. The next point to be considered is whether, looking at the whole agreement, there is

(1) 3 App. Cas. 72.

(2) 10 P. D. 103.

(3) [1903] 1 K. B. 750; [1904] 1 K. B. 412.

any clear indication that it was the intention of the parties that the warranty of seaworthiness shall be affected. I think the indication is rather the other way. The earlier part of art. 10 provides that the owners are to be exempted from liability for unseaworthiness only provided reasonable means have been taken to prevent it, and how can it be said that there is any indication that in this special case owners are not to be liable even when they have failed to provide such reasonable means? I think art. 18 also shews that the protection given to owners is always to be subject to the proviso that reasonable means must have been taken to prevent unseaworthiness. In my opinion this is a stronger case against the owners than *Price v. Union Lighterage Co.* (1), and I must hold that the fact that the plaintiffs were covered to a large extent by insurance does not exempt the defendants from any part of their liability.

As to the second point, it appears very doubtful whether any of the clauses of the Conference bills of lading apply, as none were attached to the agreement, but I will assume that they do. The clause in the bill of lading is this. [The learned Judge read the clause set out above.] This is not a claim for damage under the bill of lading, but under the agreement. I do not think this clause was intended to form any part of the agreement. That alone is, I think, a sufficient answer. But what was the net invoice price of the goods damaged here? There was but one invoice, and all the goods included in it were damaged more or less, and the price was 23,444*l.* 8*s.* 4*d.* If freight is added to this, it would greatly exceed the 23,900*l.* I think it should be added. It has to be paid, and I think the intention was that the owners of the cargo should be indemnified against all costs. In some cases the holder of a bill of lading would buy at a price to include a freight, in some cases not. It could not have been meant that the amount for which the shipowner was to be liable was to depend on the chance of whether the invoice included freight or not. I think the real intention was that profit should be excluded and nothing more. I think I am bound to hold on these two grounds that the clause

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in the bill of lading does not in any way diminish the liability of the shipowner to pay the 23,900*l.* assessed by the jury. The plaintiffs put before me other contentions on this point well worthy of consideration, but it is unnecessary for me to give any opinion on them.

In the result, therefore, there must be judgment for the plaintiffs for 23,900*l.* and costs.

*Judgment for plaintiffs.*

Solicitors for plaintiffs: *Parker, Garrett, Holman & Howden.*

Solicitors for defendants: *Rawle, Johnstone & Co., for Hill, Dickinson & Co., Liverpool.*

F. O. R.

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# THE KING v. MOUNTFORD.

*July 4, 5, 28.*

*Ex parte* LONDON UNITED TRAMWAYS (1901), LIMITED.

*Lands Clauses Acts—Compensation for injuriously affecting other Lands—Land taken by Tramway Company for Purpose of widening a Street and not used as a Tramway—Depreciation in Value of Property by Use of Tramway.*

A tramway company under statutory powers was permitted to lay a tramway along a street, but was not allowed to do so until that street had been widened to a specified extent. The company, under further statutory powers, took compulsorily a portion of the applicant's land for the purpose of widening the street, and then constructed the tramway along the street, but the tramway did not pass over any portion of the land so taken from the applicant:—

*Held*, that in assessing the compensation to be paid to the applicant he was entitled to receive the value of the land taken and compensation for any depreciation in the value of his other adjoining property by reason of the land taken being used as part of the street, but that he was not entitled to compensation for the depreciation in the value of that other property by the running of trams along the street.

RULE nisi for a certiorari to bring up and quash an inquisition verdict and judgment had and taken before the sheriff of Surrey touching the claim to compensation made by one A. H. Mountford, dentist, against the London United Tramways (1901), Limited, for

the purchase by them of his interest in certain lands and tenements set forth in the notice of claim served by him on them on or about April 20, 1905, and also for the damage sustained by him by reason of the severing and injuriously affecting his other lands by the exercise by the tramways company of the powers of their Acts, upon the ground of excess of jurisdiction, of which the following are the particulars: (a) The jury, in awarding the sum of 400*l.*, awarded and included compensation for loss in his future practice of the said A. H. Mountford from the change in the character of the district owing to the tramways, and from loss of light and privacy consequent upon the opening and running of the tramways past his house.

(b) The notice to treat was served in pursuance of the powers conferred by the London United Tramways Act, 1902, which powers authorized the street widening only, and no compensation could be awarded to the said A. H. Mountford by reason of the laying and opening of the tramways authorized by the London United Tramways Act, 1901.

By the London United Tramways Act, 1901 (1 Edw. 7, c. cclx.), s. 5, power was given to the London United Tramways Company to make (inter alia) a tramway passing along Eden Street, in the borough of Kingston-upon-Thames. There was, however, in the Act no provision for the widening of Eden Street, and by s. 8 the company were not allowed to lay down or construct any tramway until the street or road in which it was to be laid should be widened to such an extent as should be necessary to leave a space of 9 ft. 6 in. between the outside of the footpath and the nearest rail of the tramway.

By the London United Tramways Act, 1902 (2 Edw. 7, c. ccxlvii.), which recited the Act of 1901 and incorporated the Lands Clauses Acts, provision was made for the compulsory taking (inter alia) of land in Eden Street for the purpose of widening that street. In February, 1905, the tramway company gave notice to Mr. Mountford, who was a dentist in occupation of Elm Lawn, Eden Street, as lessee for a term of twenty-one years from June 24, 1897, of their intention to take a strip of land between nine and ten feet wide and about seventy feet long from his forecourt for the purpose of widening Eden Street

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under the provisions of the Act of 1902. The amount of compensation was referred to a sheriff's jury in accordance with the provisions of the Lands Clauses Acts.

No portion of the tramway was laid upon any part of the land thus compulsorily taken from Mr. Mountford, but that land was used solely for widening Eden Street.

The under-sheriff, in summing up the case to the jury, directed them to find under head A the actual value to Mr. Mountford of the strip of land taken, and under head B any loss in the future to his practice from the change in the character of the neighbourhood owing to the tramways, and from loss of light and privacy consequent upon the opening and running of the tramways.

They returned a verdict under head A of 360*l.* and under head B of 400*l.*, and this rule was then obtained.

*Bankes, K.C.* (*R. A. Gordon* with him), shewed cause against the rule. The compensation is not limited to damage arising from the use of the particular piece of land taken: *Duke of Buccleuch v. Metropolitan Board of Works* (1); *Hammersmith Ry. Co. v. Brand* (2); *City of Glasgow Union Ry. Co. v. Hunter*. (3) Where land has been compulsorily taken the owner is entitled to be compensated, not merely for the land taken, but for the injurious affection of his land generally by the exercise of the statutory powers: *Cowper-Essex v. Local Board for Acton*. (4) The principle on which compensation is allowed in these cases is that had it not been for the statutory powers the owner of the land, by refusing to part with it, could have prevented the undertaking from being carried out. He is therefore entitled, when his land is taken under statutory authority, to compensation for any depreciation in the value of his property brought about by that undertaking. [He also referred to *In re London, Tilbury and Southend Ry. Co. and Trustees of Gower's Walk Schools* (5); *In re Stockport, Timperley, and Altringham Ry. Co.* (6)]

*Roskill, K.C.*, and *Courthope-Munroe*, in support of the rule.

(1) (1872) L. R. 5 H. L. 418.

(2) (1869) L. R. 4 H. L. 171.

(3) (1870) L. R. 2 Sc. App. 78.

(4) (1889) 14 App. Cas. 153.

(5) (1889) 24 Q. B. D. 326.

(6) (1864) 33 L. J. (Q.B.) 251.

The claimant's land was only taken for the purpose of widening the street, and was not used for the purpose of the tramway. He is therefore not entitled to any compensation for any injurious affection of his property by the use of the tramway. The only compensation to which he is entitled in addition to that for the loss of the land taken is in respect of any injury done to his other land by the use of the land actually taken. [They referred to *Caledonian Ry. Co. v. Walker's Trustees* (1); *Caledonian Ry. Co. v. Ogilvy* (2); *In re Penny and South Eastern Ry. Co.* (3)]

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*Cur. adv. vult.*

July 28. DARLING J. read the following judgment:—This case raises a question of some difficulty as to the matters which a sheriff and his jury are entitled to take into consideration in awarding compensation in respect to land compulsorily taken by virtue of the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18), s. 63. That provision ensures that, in estimating the purchase-money of the land or compensation to be paid for the taking of it, "regard shall be had, . . . not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owner of the lands by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers" of the Act. The London United Tramways Company were authorized by an Act of 1901 to make and lay a tramway along Eden Street, but they were not to use the line for traffic until they had widened that street. Mr. Mountford is a dentist who owns a house fronting Eden Street, from which it is separated by a forecourt and land on which a stable stood. By an Act of 1902 the tramway company were empowered to purchase compulsorily land necessary for the widening of Eden Street, and to sever land so purchased from land not taken, making such compensation as is given by the Lands Clauses Consolidation Act. The company took a portion of Mr. Mountford's forecourt and part of the other land of his. On no portion of the land so taken

(1) (1882) 7 App. Cas. 259.

(2) (1856) 2 Macq. 229.

(3) (1857) 7 E. & B. 660.

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was the tramway laid, nor was any of it retained by the tramway company. It was all thrown open to the public as an addition to Eden Street, which thus became wider, and the tramway company ceased to have any further interest in the added land or concern with it. Proceedings having been taken, and the matter brought into the sheriff's court, the jury awarded 360*l.* in respect of the land so taken and 400*l.* in respect of the injurious affection of the remainder of Mr. Mountford's premises, including loss of goodwill in his business. That sum of 400*l.* was arrived at by considering the injury likely to be done to Mr. Mountford's other land, and to his practice, by the tramway company's legal user of the tramway laid by the company upon land which never had been his. Whether this was a matter entitling Mr. Mountford to compensation in that respect is the question we have to decide. That he would have been entitled to such compensation had the tramway been laid and worked upon the very land taken from him appears to be indisputable, and to follow from the decisions of the Courts in many of the cases cited at the Bar. Yet, even so, it seems to me that a person whose land is taken and paid for at its full value and more receives some advantage over others equally inconvenienced with himself. In this case, for instance, Mr. Mountford suffers no more from the running of the trams on the line in Eden Street than does his neighbour on the opposite side of the road, whose house, indeed, is nearer to the tramway than is that of Mr. Mountford himself. For the taking of his land Mr. Mountford has been paid 360*l.*, and in that sum is included damages for the diminished value of the land left to him, and he has also received, included in the sum of 400*l.*, further damages for the use of that taken owing to and in respect of the passing over it near Mr. Mountford's house of the public and the ordinary traffic of the street. More than this I cannot satisfy myself that he is entitled to claim. The right of an owner of land taken to receive compensation of this kind is commonly put upon the ground that he could veto the undertaking—in this instance the working of the tramway. Thus Hannen J. says in the *Duke of Buccleuch's Case* (1): "If the

Act of Parliament had not been passed, the plaintiff would have had it in his power, by refusing to part with his rights, to prevent the land now made into a road from being so converted. It seems but just that if his power to prevent mischief being done to him is taken away by law, he should receive compensation according to the measure of the injury inflicted upon him." Here it seems to me Mr. Mountford has, without what is now in dispute, obtained all that his Lordship's words would give him. He could not veto the making of the tramway along the public highway, nor the working of it, though the Attorney-General might have proceeded by information against the company had they run trams before Eden Street was widened. Mr. Mountford could have vetoed only the taking of his own land in order to enlarge the street, and had he done this it is conceivable that a piece of someone else's land might have been compulsorily acquired on the other side of the road, and so the trams have run in spite of him. It is plain that Mr. Mountford is claiming compensation for quite other reasons than that on which the Duke of Buccleuch obtained it. The embankment, in that case, was made upon a piece of land over which the Duke had rights of access to the river—the whole foreshore lying between Montagu House and the bed of the Thames. He received compensation for all that was taken and for the injury caused by the traffic thenceforth passing over and along it when the river had been embanked. For that case to govern this one in the sense contended for by Mr. Mountford it seems to me that the House of Lords should have awarded damages to the Duke not only in respect to the use of the embankment, but also for the more frequent navigation of the river alongside it by smoky and noisy steamers; navigation which would be rendered by the taking of the foreshore less dependent on the tides, and therefore more nearly continuous. I do not propose to quote at length the many cases cited to us, but I know of nothing which appears to me in conflict with what I have said. Referring to the doctrine upon which Mr. Mountford bases his claim, Lord Halsbury, in the *Cowper-Essex Case* (1), says: "But a second proposition is, it appears to me, not less conclusively established,

(1) 14 App. Cas. 153, at p. 161.

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and that is, that where part of a proprietor's land is taken from him, and the future use of the part so taken may damage the remainder of the proprietor's land, then such damage may be an injurious affecting of the proprietor's other lands, though it would not be an injurious affecting of the land of neighbouring proprietors from whom nothing had been taken for the purpose of the intended works." The reasoning here is, I confess, to me difficult to follow, and Lord Macnaghten seems equally not to have thought it conclusive, for he says in the same case (1) : "It may be said that an adjoining lessee or owner from whom no land is taken might suffer in the same way, and that he would be without redress. That is true. But I cannot see why a person whose case is within the spirit and within the very letter of the Act should be deprived of the full measure of compensation because his neighbour, who is not within the Act at all, is perhaps hardly dealt with." To my mind this matter presents itself thus. Mr. Mountford suffers by the taking away of his piece of land, and has been compensated therefor. He suffers further by reason of the public user of that piece of land as a portion of the street into which it has been thrown, and for that also he has admittedly received full compensation. He suffers with every other dweller in Eden Street from the running of trams along a public highway, but his house has been brought nearer to the road than it was before his land was taken. Had the tramway been laid upon his land at all, he would have been entitled to the advantage he claims over all his neighbours, and he would have gained it by something very like a fiction. There is no case yet decided which has carried so far the doctrine first laid down in the *Stockport Case* (2) as is here contended for, and I do not feel that justice requires an extension in itself so partial and invidious. I think this rule should be made absolute for the reasons I have attempted to explain.

PHILLIMORE J. read the following judgment:—I have had the opportunity of reading my brother's judgment, and I concur in the conclusion at which he has arrived. But I have had, and still have, considerable doubts. The sentence in the judgment

(1) 14 App. Cas. 153, at p. 177.

(2) 33 L. J. (Q.B.) 251.

of Crompton J. in the *Stockport Case* (1), in which he speaks of "mischief being caused by what is done on the land taken," is not to be pressed too literally. If a portion of an owner's land is taken for a railway, I should be of opinion that he could recover damage for smoke and noise arising in the process of shunting, though the land taken from him carried only a plain line of rails and the sidings were fifty yards away. The principle on which the cases proceed is that the owner who has lost his veto by reason of compulsory powers being given to the company should be held entitled to such compensation in respect of the lands which he retains as he would reasonably have stipulated for if he were a willing seller of the land which is to be taken. It might be said that he who can refuse to sell land without the sale of which the company could not work their undertaking has just as effective a veto as he who could refuse to sell the land on which the undertaking is to be worked. But it seems that this principle of veto has some limits. An owner of two farms not adjacent, but in the same parish, would before he willingly parted with part of the lands on one farm stipulate for compensation not only for injury to be done to the residue of that farm, but also for injury to be done to the other farm. The cases, however, have settled that where land is taken compulsorily his compensation would be only in respect of the farm from which the severance is made: see *City of Glasgow Union Ry. Co. v. Hunter*. (2) The right to compensation in these cases of severance being so exceptional, and as many judges have said anomalous, I think that we are right in confining it within somewhat narrow limits, and as the land in question is not taken by the tramway company to be used for the purpose of the undertaking, but is to be acquired and paid for by the tramway company in order that it may be thrown into the road, I think that the owner is not let in to claim compensation for injurious affection by reason of the working of the tramway on other parts of the road. Had the land bought by the tramway company been land which was to be occupied by it, and occupied as physically necessary for the working of the undertaking, I should have thought otherwise. For instance, I should apply

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(1) 33 L. J. (Q.B.) 251, at p. 253.

(2) L. R. 2 Sc. App. 78.

1906	he rule in the <i>Duke of Buccleuch's Case</i> (1) to land taken by a
REX	railway company for the purpose of forming embankments or
v.	slopes.
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LONDON	<i>Rule absolute.</i>
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TRAMWAYS	Solicitors : <i>Sherrard &amp; Sons ; Stanley &amp; Co.</i>
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LIMITED,	
<i>Ex parte.</i>	A. P. P. K.

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July 23, 24,	<i>Mines—Salt Mine—Underground Brine, Rights of adjoining Landowners in</i>
25, 26, 27 ;	<i>respect of—Percolating underground Water.</i>
Aug. 10.	

The plaintiffs were the owners of a group of rock-salt mines which had for many years been flooded with brine, by reason of the fact that the working of the mines had caused the ground above them to subside, with the result that surface water found its way down to the beds of rock-salt below, where it became saturated with the salt. These mines had for many years been connected with one another by means of old underground channels and passages, which it was no longer possible to close, and they formed one large reservoir of brine. Into this reservoir there also found its way a certain quantity of other brine which came through fissures in the soil from land outside the plaintiffs' property, but a substantial portion of the brine therein was formed by the dissolution of the plaintiffs' salt rock in the manner above mentioned. The defendants, in the exercise of a licence to pump brine granted to them by the previous owner of one of the plaintiffs' mines, pumped large quantities of brine from the said mine and from the reservoir and appropriated it for their own profit:—

*Held*, that the defendants were not guilty of any actionable wrong in so doing, notwithstanding that they thereby abstracted salt which had formed part of the plaintiffs' rock, and that the continuance of the pumping would cause fresh surface water to dissolve further portions of the plaintiffs' rock into brine, which in its turn would be abstracted by the defendants' pumps.

TRIAL before Lord Alverstone C.J. without a jury.

The action was brought for an injunction to restrain the defendants from continuing to pump salt brine from a shaft known as Penny's Lane, near Northwich, in Cheshire ; secondly, to recover damages for the abstraction, since 1893, of salt brine, or salt rock, alleged to belong to the plaintiffs ; and thirdly,

(1) L. R. 5 H. L. 418.

damages for injuries caused to houses and other property belonging to the plaintiffs by the subsidence of the surface in the district to the north of Northwich, due, as the plaintiffs allege, to the pumping of brine by the defendants at the Penny's Lane shaft.

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The following statement of facts is taken from the judgment of the Lord Chief Justice :—

Salt mining and brine pumping have gone on in many parts of Cheshire for many generations, probably centuries. (1) The salt rock in the Northwich district consists of two beds; the top bed is found at a distance, varying over the area in question, of from about forty-seven feet to about a hundred feet below Ordnance datum. The upper bed of rock-salt is of a thickness of about eighty feet (varying from seventy feet to ninety feet). The base of the top bed is substantially horizontal. Below the top bed is a thickness of thirty feet of marl and marlstone. Below this is the lower bed, which is about the same thickness as the upper, namely, eighty feet. In this district prior to 1835 salt was obtained in two ways, one by sinking a shaft down to the top of the upper bed, and thereby, if the rockhead was found to be wet, pumping up what was called "natural or rockhead brine," or, in other words, water impregnated with dissolved salt rock obtained from the top of the upper bed; and, secondly, by dry mining in the ordinary way—that is, by sinking shafts to the upper or lower bed, as the case may be, and the digging out of mines, in which the salt rock was hewn and sent up in tubs to the surface for subsequent treatment. For the support of the roofs of the mines, in the case of dry mining, pillars of salt from seven to ten yards square were left at a distance of twenty to twenty-five yards apart. During the latter half of the last century a third method of mining had become common in the district, namely, pumping brine from mines which had become inundated by collapse of the roof and subsidences of the ground, and the access to the unworked salt rock therein of surface water. Immediately to the eastward of the main street in Northwich, known as Witton Street, is the shaft belonging to the defendants, known as Penny's Lane. From 1838

(1) See the customary dues from the salt mines of Northwich set out in Domesday Book i 268.—F. P.



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onwards, at different dates, owing to the increase of working in the dry mines, and to other causes which need not be considered, but which are very important in their results, the roof of some of the dry mines in the district collapsed, some in the upper and some in the lower beds, the mines themselves became flooded, and large areas of water of considerable depth were formed upon the surface due to subsidence. From these areas fresh water found its way down to the upper and lower beds and became impregnated with salt and was then pumped up as brine—that is, water saturated with salt—through shafts, either old or new, which were sunk down to the inundated mines.

The mines belonging to the plaintiffs, as to which their claim in this action arises, were nine in number, situated, speaking generally, to the north of the Penny's Lane shaft of the defendants, and were called Marshall's No. 1, Wakefield's (otherwise Worthington's), Barton's, Thompson's, Dunkirk, Marshall's No. 2, Platts-hill, Ashton's Old Mine, and Tomkinson's. It was proved by the plaintiffs, and ultimately admitted by the defendants, that all these nine mines were connected together by underground passages. Some of these passages were originally made for the purpose of ventilation when the mines were worked as dry mines. Salt brine from the mines was pumped by the plaintiffs at Dunkirk shaft, a distance of some 400 yards to the north-east of the Penny's Lane shaft. These nine inundated mines and the Penny's Lane shaft were known and spoken of in the case as the Dunkirk mines.

By a deed of conveyance dated September 6, 1888, John Thompson, who was at that date the owner of Penny's Lane shaft, conveyed to the defendants Penny's Lane shaft, together with certain land with buildings and workshops thereon, and a small quantity of salt rock lying under certain land adjoining, "Together also with full and free liberty and authority to use the tunnel or driftway and borehole made by the said John Thompson from the said rock-salt mine firstly hereinbefore described," i.e., Penny's Lane, "or any additional tunnels driftways or boreholes which may hereafter be constructed by the said company its successors or assigns and which it is hereby authorized and empowered to construct . . . for the purpose of obtaining and

pumping brine from the flooded mine belonging to the said John Thompson north of the said hereditaments hereby assured." The deed also contained a covenant by the defendants that they would "if so required by the said John Thompson his heirs or assigns so long as the same can by any reasonable means be obtained through and by means of the said mine or the tunnels and shafts thereof for the time being supply to the said John Thompson his heirs and assigns such quantity of brine not exceeding 15,000,000 gallons in any one year as may be required for the manufacture by the said John Thompson his heirs and assigns of white salt on such lands or some of them of him the said John Thompson." The flooded mine belonging to John Thompson north of the hereditaments in question was that part of Marshall's mine which lay south of a certain stream known as Wade Brook and was Thompson's freehold. This part of Marshall's mine had been worked from the part of Marshall's mine north of Wade Brook, so that there was underground connection, through which brine could pass from the mine north of Wade Brook to the mine south of Wade Brook. The existence of this connection between Marshall's mine north of Wade Brook and the mine south of Wade Brook was known long before 1888. It had in that year become impossible to prevent brine getting from one part of the mine to the other if pumping took place from any shaft which was connected with the mines so as to withdraw the brine and disturb the equilibrium or balance of brine or water pressure. In fact from the time of their inundation all the nine Dunkirk mines formed an underground reservoir of brine and water which got in from the surface.

On December 3, 1888, the plaintiffs took from the same John Thompson a conveyance of certain mines which lay to the north-west of the land conveyed to the defendants. The actual terms of that deed are not material, but it gave the plaintiff company notice of the conveyance to the defendants of September 6, 1888. On October 3, 1890, the plaintiffs purchased from John Thompson all the minerals in other mines to the north-west of Penny's Lane, and among them the minerals owned by Thompson south of Wade Brook, or, in other words, the minerals contained in what was described as Thompson's inundated mine in the deed

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of September, 1888. This deed recited the grant to the defendants of September 6, 1888, and particularly that part of it which gave the defendants full and free liberty to use the borehole for the purpose of obtaining and pumping brine from Thompson's flooded mine, and it was expressed to assign to the plaintiffs the full and exclusive benefit of the covenant therein of the defendants to supply brine not exceeding fifteen million gallons in a year if required. (1)

The plaintiffs at other dates subsequent to September 6, 1888—the exact dates are not material—took conveyances from other persons of the eight other mines in the Dunkirk group already referred to. From the year 1893 onwards the defendants continued to extract from their Penny's Lane shaft brine to an enormous extent; the quantity in the twelve years up till the end of 1905 amounted to upwards of 2093 million gallons, representing 2,791,000 tons of rock-salt. It was admitted by the defendants, by their answers to interrogatories, that no substantial part of the brine pumped by the defendants from the Penny's Lane shaft was produced from the salt rock conveyed by Thompson to the defendants, or in Thompson's inundated mine south of Wade Brook. It was, however, contended by them that a very considerable, though unknown, portion of the brine pumped through Penny's Lane shaft came from beds of salt rock which did not belong to the plaintiffs. It was alleged that subsidences occurred at various places in Northwich, and also to the west and north of the Dunkirk area. It was alleged that various other mines to the north and west contributed brine, or allowed access of water which became brine in underground basins, for a very great distance, and that no one could tell where brine pumped up at any shaft was in fact produced. It was urged in addition by the defendants that a considerable portion of the brine which they had pumped at Penny's Lane was rockhead brine formed by

(1) It was contended by the defendants that the fact of the plaintiffs having taken an express assignment of the benefit of the defendants' covenant estopped them from alleging that the defendants' act in pumping under Thompson's licence

was wrongful. The Lord Chief Justice, however, was of opinion that as Thompson could not give any rights which he did not possess or any rights over other persons' property, it did not directly affect the question of the defendants' liability.

the dissolution of salt rock on the top of the upper bed, and possibly to some extent on the top of the lower bed, and not mine brine, and that this rockhead brine found its way to the defendants' shaft and to other shafts in the district by means of what were called "brine runs," which were at a considerable depth below the surface, and could only be traced from time to time by the subsidences which they caused. The Lord Chief Justice found as a fact that natural or rockhead brine, as distinguished from mine brine, does travel underground in brine runs for long distances, and might have found its way into the plaintiffs' inundated mines from places outside their property, and that it would consequently be wrong to attribute the whole of the brine pumped at Penny's Lane to salt rock the property of the plaintiffs. On the other hand, he found as a fact that the defendants had by pumping brine abstracted a very large quantity of salt from the beds of rock-salt belonging to the plaintiffs, though whether the quantity could ever be estimated was uncertain. And he further found as a fact that if pumping was continued at Penny's Lane the defendants must continue to dissolve more of the plaintiffs' rock, and to abstract the salt therefrom in the brine pumped up from the Penny's Lane shaft. (1)

*Balfour Browne, K.C., Freeman, K.C., Bankes, K.C., R. V. Bankes, and V. Balfour Browne*, for the plaintiffs. The brine which the defendants pumped was, to the extent to which it was formed by the dissolution of the plaintiffs' salt rock, the plaintiffs' property, and the defendants were guilty of a trespass in taking it. Any contrivance by which one person takes away the rock-salt of another, whether it be by means of a pickaxe or a pump, is equally wrongful. The rule that there is no property in percolating underground water has no application except to water, and brine is a distinct thing from water. In *Jordeson v. Sutton, Southcoates and Drypool Gas Co.* (2) there was

(1) As the Lord Chief Justice held, with respect to the plaintiffs' claim for damage caused to their property by subsidence, that, even if the claim were in other respects maintainable, there was not sufficient evidence that

that subsidence was caused by the defendants' pumping to justify him in finding for the plaintiffs on that head, that part of the case has been omitted from the report.

(2) [1899] 2 Ch. 217.

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underneath the plaintiff's land a stratum of quicksand known as "running silt," which stratum extended under the defendants' land adjoining. The defendants, in excavating their own land, withdrew the running silt from under the plaintiff's land and thereby caused it to subside. Lindley M.R. and Rigby L.J. held that the rule of *Popplewell v. Hodkinson* (1) that a landowner has no common law right to the support of subterranean water did not apply to silt, and that the defendants, in removing the support of the silt, had committed an actionable nuisance. So, too, in *Trinidad Asphalt Co. v. Ambard* (2), where the defendants, by removing the lateral support of their land, caused the pitch which formed the main ingredient of the plaintiffs' land to melt and ooze forth into their own land, and thereupon appropriated it to their own use, it was held that damages were recoverable both for injury caused by subsidence of the plaintiffs' surface and for loss of the pitch. Then if silt and pitch, although fluid, are not governed by the rule as to water, neither is brine. No distinction can be drawn for this purpose between the case of a mineral which is rendered fluid by reason of its being held in suspension in water, as in the case of the silt, and one in which it is rendered fluid by reason of its being held in solution, as in the present case. In neither case is the fluid product water. Copper is sometimes pumped up from a mine in solution, and then precipitated by iron, and so won by the mineowners; but a neighbouring landowner could not justify draining the copper solution away and appropriating it to his own use.

[They also referred to *Grand Junction Canal Co. v. Shugar* (3) and *Fletcher v. Birkenhead Corporation*. (4)]

*Sir R. B. Finlay, K.C., Upjohn, K.C., A. J. Walter, and Rowlatt*, for the defendants. No action lies against the defendants for abstracting salt in the way in which it was done. The case of *Wilson v. Waddell* (5) is an authority for the proposition that where mineral workings have caused a subsidence of the surface and a consequent flow of rainfall into an adjacent lower coalfield, the injuries, being entirely from gravitation and

(1) (1869) L. R. 4 Ex. 248.

(3) (1871) L. R. 6 Ch. 483.

(2) [1899] A. C. 594.

(4) [1906] 1 K. B. 605.

(5) (1876) 2 App. Cas. 95.

percolation, are not a valid ground for any claim of damages. And in that case Lord Blackburn cited with approval a passage from the judgment of Lord Cairns in *Rylands v. Fletcher* (1), where he said: "The owners or occupiers of the close . . . might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land be used; and if in what I may term the natural user of that land there had been any accumulation of water either on the surface or underground, and if by the operation of the laws of nature that accumulation of water had passed off into the close occupied by the plaintiff, the plaintiff could not complain that that result had taken place. If he had desired to guard himself against it, it would have lain upon him to have done so by leaving or interposing some barrier between his close and the close of the defendants in order to have prevented that operation of the laws of nature." Therefore, in the present case, as the brine found its way by gravitation into the defendants' property as the result of the plaintiffs or their predecessors in title having worked their mines in the ordinary way, the defendants could not complain of their being invaded by that brine. The plaintiffs were not bound to keep up a barrier to prevent the invasion. That being so, the defendants were entitled to protect their property and get rid of the brine by pumping it out; and if they were entitled to pump it out for purposes of protection, they were equally entitled to pump it out for purposes of profit, for the motive with which a man does an otherwise lawful act is perfectly immaterial: *Bradford Corporation v. Pickles*. (2) Though the plaintiffs were not bound to erect a barrier for the benefit of the defendants, if they wanted to keep the brine for themselves they were bound to erect a barrier for their own protection. The onus of erecting the barrier lies on the party complaining of the brine's escape; and that it was practically impossible here to erect such a barrier does not affect the rights of the parties. The rule laid down in *Acton v. Blundell* (3) and *Chasemore v. Richards* (4) as to the right of a landowner to appropriate percolating underground

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(1) (1868) L. R. 3 H. L. 330, at  
 p. 338.

(2) [1895] A. C. 587.

(3) (1843) 12 M. & W. 324,

(4) (1859) 7 H. L. C. 349.

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water applies equally to brine. The distinction between water and brine is one of degree only, not of kind; for all water contains a certain proportion of salt. The difference, however, between water and running silt such as that in *Jordeson's Case* (1) is one of kind. In that case the silt was nothing more than wet sand, the evidence being that the proportion of sand preponderated greatly over that of the water. Moreover, Vaughan Williams L.J. dissented from the judgments of the other members of the Court. The plaintiffs, therefore, cannot complain of the loss of the brine.

[They also referred to *Cabot v. Kingman* (2) and *Ballard v. Tomlinson*. (3)]

*Balfour Browne, K.C.*, in reply.

*Cur. adv. vult.*

Aug. 10. LORD ALVERSTONE C.J., after stating the facts as above set out, proceeded:—Upon the stated facts found by me the difficult question of law arises, Are the plaintiffs entitled to recover in respect of their claims, and are they entitled to restrain the defendants from continuing to pump brine at Penny's Lane? The defendants have by their pumping raised a very large quantity of brine formed by the dissolution of rock-salt belonging to the plaintiffs. At the same time I also find that the brine so pumped by the defendants has been more or less mixed with brine derived from other sources; that is, from the dissolution of rock which does not belong to the plaintiffs. Under those circumstances, have the defendants committed an actionable wrong? This seems to me a question of the greatest difficulty, and my mind has fluctuated very much, not only during the arguments, but during the consideration of the case. It is not, I believe, covered by authority, and it is extremely difficult to see within which class of case it falls.

For the sake of clearness I will endeavour to summarize certain points or arguments which bear upon the question whether there are any previous decisions which govern the case. The defendants relied largely upon the cases relating to underground water,

(1) [1899] 2 Ch. 217.

(2) (1896) 166 Mass. 403.

(3) (1885) 29 Ch. D. 115.

such as *Chasemore v. Richards*. (1) I doubt very much whether they afford conclusive arguments in all cases of brine pumping. Suppose, for instance, A.'s land remaining in its natural condition and containing beds of rock-salt, B., the owner of an adjoining piece of land, on sinking a well, found that he could pump brine which beyond question came from the dissolution of the salt rock of his neighbour A., and not from any salt rock on B.'s own land, or which he had a right to get, and that B. continued his pumping, not for water, but to obtain the salt rock of his neighbour. I am not at present prepared to say that no action would lie by A. against B. on the ground solely of the principle as to underground water laid down in *Chasemore v. Richards* (1) and similar cases. The plaintiffs, adopting this contention, suggested that the case fell within a ruling of the majority of the Court in *Jordeson v. Sutton, Southcoates and Drypool Gas Co.* (2), and particularly the judgment of Lord Lindley, as Master of the Rolls, quoting with approval the opinion of the Supreme Court of Massachusetts in the case of *Cabot v. Kingman*. (3) The plaintiffs also relied upon the case of *Trinidad Asphalt Co. v. Ambard*. (4) In my opinion, however, rightly understood, the principle of those cases is not one on which the plaintiffs can successfully rely in this action; they were cases of the withdrawal of support to which the person complaining was entitled, and, except in so far as the action is based on the claim for damages for subsidence, are clearly distinguishable from the case now before me. Nor does the case of *Grand Junction Canal Co. v. Shugar* (5) carry the plaintiffs any further, because here the real complaint is not of the drawing off of any fresh water to which the plaintiffs claim a right, but the removal of their salt rock or the abstraction of the brine which has been produced from their beds of rock-salt. I think this case can only be rightly decided by bearing in mind the true state of the facts, and endeavouring to ascertain what are the rights of the parties having regard to those facts. Long prior to 1888, when the defendants and plaintiffs acquired their mines respectively, the

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(1) 7 H. L. C. 349.

(3) 166 Mass. 403.

(2) [1899] 2 Ch. 217.

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actual condition of things had been wholly changed. The combined result of underground mining, pumping for natural brine, and the connecting together of underground and different mines, followed by the subsequent inundations, had created a wholly artificial state of things. A shaft lawfully put down through any man's freehold might reach some underground channel, or cavity, from which he would pump brine, the real source of which no one could accurately predict, although it might be possible after the event, by tracing subsequent subsidences, to form a judgment as to the area from which the salt rock had been dissolved. It seems to me that to such an abnormal and, from one point of view, artificial condition of matters, looking, moreover, to the fact that the water which had dissolved the salt might come from long distances, far away from any particular pumping shaft, and might be in many cases underground or even surface water in which no property existed in anyone, it is not possible to apply to such a case the ordinary principles of law relating to underground property. That they cannot be applied in the matter of subsidences has been recognized by the Legislature, and led to the Brine Pumping (Compensation for Subsidence) Act, 1891; but I think that when a man puts down a shaft and pumps in his own land (both of which acts are *prima facie* lawful) the act does not of necessity become unlawful simply because it turns out that the brine thereby obtained may be the result of dissolution of rock in another man's property. It must depend upon the particular circumstances of the case. I state this view with very great diffidence, but it is the best that I am able to form after very careful and anxious consideration. So far as one may argue from analogy, pumping of brine under such circumstances appears to me to have more in common with the cases of underground water than the cases of support upon which the plaintiffs rely, but I have already indicated that, in my opinion, the cases as to underground water are not conclusive, assuming matters to remain in their natural condition. The cases of *Acton v. Blundell* (1) and *Smith v. Kenrick* (2) are illustrations of the principle which is to be found in many other decisions, that the exercise of a lawful right of mining does not become unlawful

(1) 12 M. &amp; W. 324.

(2) (1849) 7 C. B. 515.

because it may injure adjoining proprietors: see also *Wilson v. Waddell* (1); and the case of *Bradford Corporation v. Pickles* (2) shews that if the use of the property is lawful the motive is immaterial. *Popplewell v. Hodgkinson* (3) and *Fletcher v. Birchhead Corporation* (4) are cases dealing with the rights of support only. I would, however, call attention to the fact that in the case of *Birmingham Corporation v. Allen* (5) both Sir George Jessel, as Master of the Rolls, and the Court of Appeal recognized that the rights of adjoining proprietors may be very different where the natural state of things has been interfered with from those in which the land remained in its natural condition.

To summarize my view as applicable to the special facts of this case, I find as a fact that for many years prior to 1888 the nine mines forming the Dunkirk group were connected together underground by channels and means of communication which no human agency or operations could close; that through these channels brine, formed in the salt rock partly in one mine and partly in another, would collect and would mix with brine reaching the same open spaces from districts outside, possibly north, south, east, and west; that in September, 1888, Thompson granted to the defendants a right to put a shaft down and a bore-hole to communicate with his inundated mine south of Wade Brook. Pumping under that licence would inevitably lead to the drawing of brine from one or more of the nine Dunkirk mines and the wider area, and the consequent dissolution of further rock-salt over the same district by the access of fresh water from the surface. At a later date the plaintiffs acquired a similar right from Thompson, and in addition property in the salt rock still existing in Thompson's mine south of and in other beds north of Wade Brook, with the certainty that whenever they pumped, their pumping would also draw brine formed by the dissolution of rock partly in their own, partly in the property of others. Under these circumstances I am unable to come to the conclusion that the defendants have committed any actionable wrong in respect of which the plaintiffs

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(1) 2 App. Cas. 95.

(3) L. R. 4 Ex. 248.

(2) [1895] A. C. 587.

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are entitled either to an injunction or to damages. The action will therefore be dismissed with costs.

*Judgment for the defendants.*

Solicitors for plaintiffs: *Busk, Mellor & Norris, for J. H. Cooke, Winsford.*

Solicitors for defendants: *W. W. Wynne & Sons, for Forshaw & Hawkins, Liverpool.*

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[IN THE COURT OF APPEAL.]

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Aug. 7.

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*Revenue—Stamp Duty—"Conveyance on Sale"—Matter or Thing to be done in the United Kingdom—Property in France—Conveyance executed in France—Consideration payable in England—Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 1; s. 14, sub-s. 4; s. 54; Sched. I.*

By a deed of "apport," executed in France, property in France was transferred by one English company to another English company, the consideration for the transfer being shares in the latter company which were to be issued, and delivered to the former company, in England. Stamp duty having been claimed as on a conveyance on sale in Sched. I. to the Stamp Act, 1891, on the ground that the instrument related to "a matter or thing to be done in the United Kingdom" within s. 14, sub-s. 4, of the Act:—

*Held* by Fletcher Moulton L.J. and Farwell L.J. (Collins M.R. dissenting), that, assuming the instrument to be a conveyance on sale, it related to property locally situate out of the United Kingdom, and was therefore not liable to duty under s. 1 or s. 54 of the Stamp Act, 1891, nor under s. 14, sub-s. 4, which imposed no liability to stamp duty, but merely attached certain penal consequences to insufficient stamping.

*Held* by Collins M.R., that, as the schedule imposed a duty on a scale measured by the consideration, the instrument was liable to an ad valorem duty as a conveyance on sale, the consideration being an essential part of the instrument, and the instrument relating to something to be done in the United Kingdom.

*Per* Fletcher Moulton L.J. and Farwell L.J.: *Quære* whether the instrument was a conveyance on sale at all.

Decision of Walton J., [1906] 1 K. B. 591, affirmed.

APPEAL from a decision of Walton J. (1) upon a case stated by the Commissioners of Inland Revenue pursuant to s. 13 of the Stamp Act, 1891 (54 & 55 Vict. c. 39).

(1) [1906] 1 K. B. 591.

On June 22, 1905, an instrument was presented on behalf of Maple & Co. (Paris), Limited, the appellants, to the Commissioners of Inland Revenue, under the provisions of s. 12 of the Stamp Act, 1891, for the opinion of the Commissioners as to the stamp duty with which the instrument was chargeable.

The instrument in question was called a deed of "apport," and was in French. The translation of the deed, so far as is material, was as follows:—

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“ Deed of ‘ apport ’

“ Between the English company, Maple & Co., Limited, hereinafter called the ‘ old company,’ registered on April 8, 1881, whose registered address is in London, with a branch in Paris, No. 5, rue Boudreau, of the one part, and the English company, Maple & Co. (Paris), Limited, hereinafter called the ‘ new company,’ registered on May 10, 1905, whose registered address is in London, of the other part. It has been agreed upon as follows:—

‘ Apport.’

“ The old company by these presents brings into the new company, under all guarantees in fact and in law, the property of which the description follows and which the latter accepts.” (Here followed a description of the property, which comprised a business established in Paris at No. 5, rue Boudreau, which had hitherto been carried on as the French branch house of the old company, the goodwill, fixtures, fittings and materials, the plant, and all other movable objects of every description used for carrying on the business, the advantages resulting from the contracts relating to the said branch, and the benefit of any commercial transactions entered into by the old company at this branch since January 1, 1905, together with the premises of the business in Paris.)

The deed further provided that, “in consideration of the ‘apport’ granted by these presents, the new company allots to the old company 72,000 shares in its share capital of a nominal value of 1*l.* each. Out of these 72,000 shares, 40,446 are allotted in consideration of the ‘apport’ of the movable property, and 31,554 in consideration of the ‘apport’ of the immovable property above mentioned. The said shares are not yet issued (created),



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this day."

All the property comprised in the instrument was situate in France. The instrument was executed by both parties in France on June 5, 1905.

By the law of France applicable to the case the instrument operated, when executed, to pass the property in all the matters comprised therein as from the date thereof as between the parties to the instrument, but until the instrument had been registered with certain formalities a purchaser for value of any of the property without notice of the instrument might get a better title than the appellants.

There is in France a duty called "droit de vente," analogous to the stamp duty in England on a conveyance on sale, but the instrument in question would not be liable to that duty.

The Commissioners, having regard especially to the provisions in that part of the instrument which is headed "Allotment of Shares," were of opinion that it related to a matter or thing to be done in the United Kingdom, and that it, therefore, came within the provisions of the Stamp Act, 1891. Inasmuch as it operated to pass the property comprised therein as between the parties, they held that it was chargeable under the head "Conveyance on Sale" in the First Schedule to that Act, and they assessed the duty upon the whole of the shares which were the consideration therefor at 10s. for every 100*l.* thereof, amounting in all to 360*l.*

Assuming the instrument to be properly chargeable as a conveyance on sale, no question was raised as to the amount of the duty chargeable.

The questions for the opinion of the Court were—(1.) whether the said assessment of the Commissioners was correct; (2.) if not, to what duty (if any) the said instrument was liable.

Walton J. held that the instrument was a conveyance on sale, but that the provision as to the issue and delivery of shares in England was not an essential part of it, and that stamp duty was, therefore, not payable.

The Commissioners appealed.

July 20, 21. *Sir J. Lawson Walton, A.-G., and Sir R. B. Finlay, K.C. (W. Finlay with them)*, for the Commissioners. The decision of the Commissioners that the instrument is chargeable with an ad valorem duty as a conveyance on sale is right and should be restored. Stamp duty is imposed in very general terms by s. 1 of the Stamp Act, 1891, which authorizes the charge of stamp duty on the various instruments specified in the First Schedule, subject to the statutory exemptions contained in the Act and in other Acts of Parliament; the present instrument comes within the charging section, but not within any of the exemptions. A deed of "apport" is a conveyance on sale within the definition in s. 54, for, though it may have relation to the bringing of capital into a partnership, it operates by the law of France to pass the property comprised in it as between the parties to the instrument; this is sufficient to shew that English law interprets it as a conveyance on sale, operating as it does as a conveyance by one English company to another. The case of *Foster v. Commissioners of Inland Revenue* (1) is an authority to this effect, for, as Lindley L.J. there pointed out in his judgment, there must in a conveyance be "a person conveying and a person taking," and there are both in the present case.

Secondly, although executed abroad, it relates to a matter or thing to be done in the United Kingdom; it therefore comes within s. 14, sub-s. 4, of the Act of 1891, and requires to be stamped as a conveyance on sale. It is true that that sub-section deals with the circumstances in which instruments not duly stamped may be received in evidence, but the proper inference to be drawn from it is that the exemption in favour of instruments executed abroad is not to apply where the instrument relates to something to be done in the United Kingdom. Execution abroad cannot be the sole test of exemption from stamp duty; if it were, s. 14, sub-s. 4, so far as it deals with an instrument "wheresoever executed," would be useless. In the present case the issue of shares of the new company, which was the consideration for the conveyance by the old company, and was an essential part of the transaction, was to take place in England, and therefore the appellants do not come within the

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(1) [1894] 1 Q. B. 516.

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exemption in s. 14, sub-s. 4, in favour of instruments executed abroad which do not relate to anything to be done in the United Kingdom. No doubt, in the case of a conveyance on sale, the stamp is imposed on the transfer or conveyance of property, but it is not necessary, in order to satisfy the statute, that the transfer or conveyance should take place in the United Kingdom; it is sufficient if the consideration for the transfer or conveyance has to be performed in this country. The cases cited for the appellants in the Divisional Court are not in point. In *Ximenes v. Jaques* (1) Lord Kenyon C.J. held that an agreement entered into out of England did not need a stamp when sued upon in this country, but the circumstances were wholly different from those in the present case; in *In re Wright and Commissioners of Inland Revenue* (2) the conveyance was executed, and in *Commissioners of Inland Revenue v. Muller & Co.'s Margarine, Ltd.* (3) the agreement was made, in this country, and *Gilchrist v. Herbert* (4) is reported too shortly to justify an argument being founded upon it.

*Danckwerts, K.C.*, and *Beddall*, for the appellants. It is admitted that as an agreement to deliver shares in England this instrument is liable to stamp duty, but it is not chargeable with an ad valorem duty as a conveyance on sale. In considering whether the instrument is a conveyance on sale, the effect of the transaction must be tested by the law of France, from which the instrument derives its operative effect, and not by the law of England. The French law is not fully stated in the case, but it appears clearly that the instrument was not liable to the "droit de vente," which is analogous to the duty on a conveyance on sale in England; and the true effect of the instrument was that both the old company and the new company had an interest in all the property brought into the common stock, and not that there was an actual sale and transfer of the property, as was held to be the case in *Foster v. Commissioners of Inland Revenue*. (5)

Secondly, even assuming the instrument to be a conveyance on sale within the definition contained in s. 54, it is prima facie not

(1) (1795) 1 Esp. 311.

(3) [1901] A. C. 217.

(2) (1855) 11 Ex. 458.

(4) (1872) 20 W. R. 348.

(5) [1894] 1 Q. B. 516.

liable to stamp duty, for it was executed abroad, and the property to which it relates is wholly situated abroad: *Ximenes v. Jaques* (1); *In re Wright and Commissioners of Inland Revenue* (2); *Gilchrist v. Herbert* (3); *Commissioners of Inland Revenue v. Muller & Co.'s Margarine, Ltd.* (4) The Crown is seeking to bring this case within s. 14, sub-s. 4, but that sub-section only applies where the thing to be done in the United Kingdom is the thing which gives rise to the liability to stamp duty, and in the case of a conveyance on sale that thing is the transfer or conveyance of the property. That was done in France; the only thing to be done in the United Kingdom was the issue and delivery of the shares, which was the consideration for the transfer, and the issuing of the shares did not give rise to the liability for the stamp duty claimed. An English taxing Act is not intended to tax transactions taking place outside the United Kingdom, and will not be so interpreted unless the intention is expressed in clear and unambiguous language; where the language is perfectly general, a limitation to the area over which the Legislature has jurisdiction should always be imported. In *Thomson v. Advocate-General* (5) it was held that legacies bequeathed by a testator domiciled abroad, and paid out of moneys in this country, were not subject to legacy duty, the proper limitation in such a case being that the testator must be domiciled in the United Kingdom. Similarly in regard to succession duty, the language of the Succession Duty Acts being perfectly general, the limitation has been adopted that the property must pass under the law of the United Kingdom: *Attorney-General v. Jewish Colonization Association*. (6) And with regard to the Stamp Acts, the general limitation is that in order to be chargeable the instrument must be executed in the United Kingdom, and this was the point on which really the decisions in *Ximenes v. Jaques* (1), *In re Wright and Commissioners of Inland Revenue* (2), *Gilchrist v. Herbert* (3), and *Commissioners of Inland Revenue v. Muller & Co.'s Margarine, Ltd.* (4) turned. The general principle is clearly enunciated in the opinion of Pollock C.B. in *Jefferys v. Boosey* (7), where he

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(1) 1 Esp. 311.

(4) [1901] A. C. 217.

(2) 11 Ex. 458.

(5) (1845) 12 Cl. &amp; F. 1.

(3) 20 W. R. 348.

(6) [1901] 1 K. B. 123.

(7) (1854) 4 H. L. C. 815, at p. 939.



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says: "The statutes of this realm have no power, are of no force, beyond the dominions of Her Majesty, not even to bind the subjects of the realm, unless they are expressly mentioned, or can be necessarily implied, and I apprehend it becomes therefore a rule in construing a statute not to extend its provisions beyond the realm, whether to create a disability or to confer a privilege." Sect. 14, sub-s. 4, imposes a disability in the event of an instrument not being duly stamped; it is a disabling section only and not a taxing section, and cannot be looked at to see whether an instrument is chargeable with stamp duty. It is a re-enactment, in somewhat less strong terms, of s. 17 of the Stamp Act, 1870, which was the subject of consideration in *Adams v. Morgan* (1); that decision shews that a limitation must be placed on the generality of the language, and that where an instrument is capable of being viewed in two different aspects, in one of which it is liable to stamp duty at one rate, and in the other at a different rate, it may be admitted in evidence if it is relied upon in the aspect in which it is properly stamped. The present instrument can only be relied upon in the United Kingdom as an agreement to deliver shares in this country, and the respondents are willing that it should be so stamped. [They also cited *Matheson v. Ross* (2); *Limmer Asphalte Paving Co. v. Commissioners of Inland Revenue*. (3)]

*Sir R. B. Finlay, K.C.*, in reply.

Aug. 7. The following written judgments were delivered:—

COLLINS M.R. This is an appeal by the Crown against the decision of Walton J., holding that a certain instrument was not liable to stamp duty as a transfer on sale under s. 54 and s. 14, sub-s. 4, of the Stamp Act, 1891. The instrument in question was executed in France in the French language, and purported to be a deed of "apport." It was made between two English companies, but all the property comprised in the instrument was situate in France. This document was presented by Maple & Co. (Paris), Limited, to the Commissioners of Inland Revenue under s. 12 of the Stamp Act, 1891, for their

(1) (1882) 12 L. R. Ir. Q. B. 1.

(2) (1849) 2 H. L. C. 286.

(3) (1872) L. R. 7 Ex. 211.

opinion as to the stamp duty with which it was chargeable. The Commissioners held that it was chargeable under the head "Conveyance on Sale" in the First Schedule, and assessed the duty upon the consideration according to the scale there laid down. On appeal by the company Walton J. held that the instrument, though purporting to be one of "apport," did comprise what in English law amounted to a sale and effected a transfer of the property, but that inasmuch as the instrument, and not the contract contained therein, was the thing taxable as a conveyance or transfer on sale under s. 54, it did not come under s. 14, sub-s. 4, unless it could be said to relate to a thing to be done in the United Kingdom; and that, though the consideration expressed in the instrument did relate to a thing to be done in the United Kingdom, the statement of the consideration was for the purpose of the transfer unnecessary, and might therefore be disregarded, with the result that the instrument was not taxable under s. 54 and s. 14, sub-s. 4 of the Act.

I will now read the material sections. Sect. 1 is the general charging section, and runs: "From and after the commencement of this Act the stamp duties to be charged for the use of Her Majesty upon the several instruments specified in the First Schedule to this Act shall be the several duties in the said schedule specified, which duties shall be in substitution for the duties theretofore chargeable under the enactments repealed by this Act, and shall be subject to the exemptions contained in this Act and in any other Act for the time being in force." Sect. 54 defines conveyance on sale thus: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any Court or of any Commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction." Conveyance or transfer on sale is thus dealt with in the schedule: "of any property (except such stock as aforesaid) where the amount or value of the consideration for the sale does not exceed 5*l.* . . . 6*d.*"; then follows the scale. Sect. 14, sub-s. 4, is as follows: "Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating,

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wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

I agree with the learned judge in all respects except in his view that the statement of the consideration can be deemed superfluous, and, therefore, as expunged from the instrument, viewed as a transfer. I can find no foundation for this view in the statute. The schedule in the passage cited imposes the tax on a scale measured by the consideration. How, therefore, can the statement of the consideration on the face of the deed be looked upon from the standpoint of the statute as superfluous? Here is an instrument which on its face is unquestionably, as the learned judge holds, a conveyance on sale, and sale involves a consideration. Why is it any the less taxable as a conveyance on sale because it involves and expresses a consideration? The succeeding sections all treat consideration as a material part of the instrument. Here, as the learned judge holds, the instrument relates to something to be done in England, and, with the greatest deference to the learned judge, I cannot see how this consideration is to be treated as non-existent.

Since I agree with Walton J. that s. 14, sub-s. 4, covers the facts of this case, I think it is not necessary to consider the question whether apart from s. 14 the general charging section is to be taken as not covering documents executed out of England, though I may remark that the special limitations in s. 59 seem to militate against this view.

I am of opinion, therefore, that the appeal should be allowed, and the order of the Commissioners restored; but as my brethren take a different view this appeal must be dismissed.

FLETCHER MOULTON L.J. The facts and circumstances of this appeal have been so fully and so clearly stated by the Master of the Rolls in the judgment which he has just delivered that I shall not repeat them, but shall proceed at once to deal with the legal points at issue.

The Stamp Act, 1891, is a Consolidation Act, putting in more convenient form, but substantially leaving unaltered (except in a few minor points) the law as it stood prior to its coming into operation. In order to attain a right view of the meaning and effect of its provisions it is advisable to consider shortly its general structure. The Act commences with a charging section directing that the instruments set out in the First Schedule of the Act shall be charged with the duties specified therein. This is the only section of the Act which imposes any obligation to stamp any instruments. It is the operative charging section. The portion of the Act which comes next in logical sequence is of course the schedule, which enumerates the documents to which this obligation applies. It consists of a long list of classes of instruments with the amount of the stamp duty chargeable in respect of them. Some of the headings in the schedule relate to instruments transferring property, some to instruments relating to acts done in the conduct of business, and some to instruments creating or affecting status, professional and otherwise. Many of the items in the list are qualified by exemptions set out in the schedules, but these exemptions are not the only limitations to the generality of the headings appearing in the schedule. These headings are of so wide and general significance that it is necessary more accurately to define the sense in which they are there used, and the nature and extent of the obligation imposed. This is done by means of sections or groups of sections of the Act relating to the several headings, examples of which may be found in the group from 29 to 39 inclusive, which relate to bank notes, bills of exchange and promissory notes, and in those from 54 to 61 which relate to conveyances on sale. Sections of this nature, including sections dealing with the duty payable in respect of instruments of a dual character which consequently come under more than one of the categories in the schedule, constitute the bulk of the Act.

It is also necessary to regulate the mode in which the stamp duty is to be paid, i.e., whether by the use of stamped paper or by an adhesive stamp duly cancelled, as well as the date at which the document should be stamped. Insistence on the literal observance of these regulations would however be too oppressive, so that

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provisions are made in the majority of cases for permitting documents which have not been stamped at the right time to be stamped subsequently on payment of certain penalties. But such locus pœnitentiæ is not given in all cases. Bills of lading, for instance, must be stamped when first executed and the omission cannot subsequently be remedied. All these matters are provided for in sections, which are not relevant to the present case. But there is another important set of sections in which the present proceedings take their origin. In many cases it must of course be difficult to decide what is the proper amount of duty payable in respect of a complicated instrument, and the penalties in case of error are severe. Accordingly the statute makes the Commissioners a tribunal with full power to adjudicate in doubtful cases, and their decision, if accepted, is conclusive as to the amount so payable. There is an appeal from such decision to the Courts, and the present proceedings are an instance of such an appeal. The Commissioners decided in the present case that the instrument to which the appeal relates ought to be stamped with an *ad valorem* stamp as a "conveyance on sale," and the question is whether they were right in so deciding.

Having thus imposed and fully defined the obligation of stamping, the Act must necessarily fix the sanctions by which the duty of properly stamping instruments is to be enforced; in other words, the penal consequences of neglecting to fulfil the duties imposed by the Act. These penal consequences are of various types, some applying only to special classes of instruments, and others more general in their character. In some cases, such as in the case of a bill of exchange, it is expressly provided that the holder cannot recover upon it unless it is duly stamped. In numerous other cases pecuniary penalties are inflicted on those who are responsible for the instrument not being properly stamped, and even on persons who have accepted it in its incomplete state. For example, any person who neglects to stamp a delivery order or who delivers goods on an unstamped delivery order incurs a fine of twenty pounds, and a similar fine is inflicted on anyone who issues or receives or takes as security a warrant for goods not duly stamped. By s. 17 there is an implied prohibition against enrolling or registering

any document which is not properly stamped, without any restriction as to what the nature of the document may be. But the most effective sanction for the due performance of the provisions of the Act is contained in s. 14, sub-s. 4. As a large portion of the argument for the Commissioners in this case turned upon this sub-section (although for reasons I shall presently state, it is in my opinion irrelevant to the case before us) I will read it in extenso: "Save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

The structure and purport of this sub-section are very clear. It imposes no duty to stamp instruments, but deals solely with the consequences of instruments not being sufficiently stamped. It applies to no document which "is duly stamped in accordance with the law in force at the time when it was first executed." It is evidently the intention of the Legislature to punish the neglect of the obligations imposed by the Act by visiting insufficiently stamped instruments generally (though perhaps not universally) with the heavy disability of not being capable of being put in evidence or of being made available for any purpose whatever. Accordingly it commences by referring to a class of instruments (using this word in its most general sense) defined in language so wide as to be certain to include the bulk, if not the whole, of the instruments to which the obligations as to stamping contained in the Act apply. But there is obviously no attempt to make the class so defined correspond to, or be conterminous with, the totality of the instruments included in the sections that impose the duty of stamping. On the contrary it is immeasurably wider. The headings in the schedule relate only to certain classes of instruments and to only a few out of the innumerable matters or things done or to be done in the domain of commercial or official life, and even as regards instruments coming within these headings large

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exemptions are made. On the other hand, the class defined in this sub-section includes every instrument executed in any part of the United Kingdom, whatever its nature and to whatever matter it may refer, and every instrument executed in any part of the world which relates to any matter or thing done or to be done in any part of the United Kingdom or to any property situate therein. Nothing can be more striking than the contrast between what I may term the reckless breadth of this definition and the precise and careful provisions and delimitations to be found in every section or part of the statute which imposes an obligation to stamp. The reason is obvious. This sub-section does not add a single document to the list of those that have to be stamped, nor does it exempt a single document; its function is only to impose a certain penalty on documents which are comprised within the carefully-defined classes that are subjected to the obligation of stamping by virtue of other provisions of the Act, but which have not been duly stamped. The Legislature therefore in framing the definition of this class had to concern itself with nothing except to make the definition large enough to include such documents improperly left unstamped as it intended to visit with these special penal consequences. That it was wider than was necessary was wholly immaterial. The excess was inoperative and could do no harm, the only matter of any importance or relevancy was that it should not be too narrow. Thus it was that the class was defined with a breadth immeasurably greater than the actual liability to stamp. It was convenient to the Crown to have it so broad that no question could be raised as to the document being liable to these penal consequences, if not properly stamped, and its breadth inflicted no inconvenience on the public, because the obligation to stamp, if it existed, must be found elsewhere.

Inasmuch as the question in this case relates solely to the existence of an obligation to stamp, this section does not concern us, and we must turn to the portions of the Act which impose such obligations in order to determine whether the decision of the Commissioners was right. It is admitted that the amount at which they fixed the stamp was based upon the view that the document came under that part of the schedule which imposes

an ad valorem duty on the "conveyance or transfer on sale of any property" (with certain exceptions) the scope of which is more carefully defined in s. 54. Unless this view is correct the decision cannot be justified, and accordingly the case reduces itself to the question of the true interpretation of s. 54, the terms of which are as follows: "For the purposes of this Act the expression 'conveyance on sale' includes every instrument, and every decree or order of any Court or of any Commissioners, whereby any property, or any estate or interest in any property, upon the sale thereof is transferred to or vested in a purchaser, or any other person on his behalf or by his direction." The appellants contend that these words are sufficient in their generality to include all conveyances wherever made of all property wherever situate, and they attempt to escape from the absurdity of suggesting that the Legislature would arrogate to itself the right to impose such sweeping obligations on every conveyance of every kind executed by persons of any nationality throughout the world, by suggesting that sub-s. 4 of s. 14 practically limits it to somewhat more reasonable dimensions by providing that the particular sanction thereby created should affect only a portion of this gigantic class. But there is a fundamental fallacy in this reasoning. If s. 54 (taken with the part of the schedule to which it refers) imposes a duty or obligation to stamp all such instruments as I have mentioned, whether British or foreign, that duty or obligation is not destroyed by the fact that the neglect of it is not visited with a particular penalty or even with a penalty at all. It remains as a duty binding at all events upon a British subject, and even if it be suggested that the Legislature assumes that no inconvenience will arise from the imposition of a statutory obligation, the neglect of which is not specifically punished because private individuals will not trouble themselves to perform it, since they will not be visited with penal consequences for not doing so, the same cannot be said of persons placed in a position in which they must be expected duly to perform all statutory duties whether they are enforced by penal consequences or not. It must be borne in mind that the contention of the appellants, if it applies to conveyances, must also apply to countless kinds of other documents. Is the liquidator

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MAPLE & CO. mercantile or otherwise, relating to business done in foreign  
(PARIS), countries, as though they related to transactions here? Yet he  
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v. clearly ought to do so, if the meaning of s. 54 and of the kindred  
INLAND sections is that the duty is universal. But the suggestion that  
REVENUE the duty may be considered to exist only so far as a punishment  
COMMIS- for its breach is provided would not save the contention of the  
SIONERS. appellants from being absurd. The sanctions prescribed by the  
Fletcher Act for breaches of its provisions are various. Take the  
Moulton L.J. case of warrants for goods. The stamp duty on them is 3*d.*,  
which may be denoted by an adhesive stamp which is to be cancelled by the person by whom the instrument is made, executed or issued, and a penalty on a person who neglects so to do or who takes an unstamped warrant even by way of security is a fine of 20*l.* Is it to be suggested that these provisions apply all over the world (even if only to British subjects), and that traders in Constantinople in making or taking warrants for goods (the definition of which is a very wide one) are breaking the law and are liable to a fine of 20*l.* for each offence? A similar example might be given in the case of receipts. There is a long list of exemptions from the duty of giving a stamped receipt for sums of 2*l.* or upwards, but they contain no reference to the payment being made abroad in respect of business done abroad. The penalty on refusing or neglecting to give a stamped receipt is a fine of 10*l.* Would any one suggest that this applies to transactions all over the world? An even more striking example will be found in the case of an appraisalment where the penalty for not writing it out on stamped paper within fourteen days of the making of it is 50*l.*, and anyone who receives or pays for any appraisalment not so written out is punished with a fine of 20*l.* If the obligation imposed by these sections is universal, it is in no way limited by any limitation of the sanction. The sanction is co-extensive with, and expressed in language as general as, the obligation.

An attempt was made by counsel for the appellants to get rid of the difficulty of treating s. 54 as imposing a universal duty by contending that it must be "read as one with" s. 14, sub-s. 4,

so as to confine the obligation imposed by it to documents within the class defined in the earlier part of that sub-section. In my opinion this is unsustainable. Sect. 14, sub-s. 4, is not by the Act made part of s. 54, nor is s. 54 expressed to be qualified by it. On the contrary, as I have already pointed out, s. 14, sub-s. 4, does not purport in any way to relate to or qualify the obligation to stamp (one case of which is that dealt with in s. 54); it assumes that such obligation is imposed aliunde. I do not mean to say that the existence of s. 14, sub-s. 4, or indeed of any other portion of the Act, may not rightly influence a Court in construing any other portion. But the duty of the Court with regard to each section is to construe it and not to alter it. If there be more than one possible construction of any portion of the Act, the existence of s. 14, sub-s. 4, may legitimately influence the choice of the Court as between those possible constructions. I go farther. In this very instance I think that we have an example of it. In my opinion s. 14, sub-s. 4, assists us in construing s. 54 by giving countenance to what I conceive to be the true construction of s. 54 (which I shall presently explain), in that it clearly indicates that instruments executed abroad and instruments relating to property in the United Kingdom do not stand in the same position under the Act as those which are executed in the United Kingdom and those which relate to property situated therein, a distinction which is also clearly indicated in s. 59, sub-s. 1. But this legitimate influence cannot go further than to guide the Court in its choice between constructions otherwise possible. We must never forget that what we have to do is to construe the language of s. 54, and by no possible construction can the words of that section bring into it all the limitations to be found in the earlier part of s. 14, sub-s. 4. No canon of construction is equal to effecting this. The interpretation suggested by the appellants is not a case of construing s. 54 by the light of other portions of the Act, but an abandonment altogether of the task and duty of construing it. It is an attempt, in lieu of construing it, to import into it limitations which are not to be found there, and which no possible interpretation of its language will support.

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We have, therefore, to construe s. 54, that is to say, to

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interpret its language, and if possible give to it a meaning which shall be reasonable. Personally, I see no difficulty in doing this, if it be approached from the right point of view. The fallacy of the arguments of the Commissioners as to the interpretation of this section is that they neglect a fundamental rule of construction in the case of fiscal Acts such as the Stamp Act, 1891. In the absence of express language to the contrary such Acts must be read as applying to the country of the statute itself, and not to the world outside, and the duties and obligations they impose are limited accordingly. Unless this is borne in mind in construing such an Act it becomes sheer nonsense. The whole world would every hour be drawing up invalid documents and incurring penalties by the tens of thousands. The statute would amount to an enactment that every dock warrant, every receipt given in acknowledgment of the payment of money in any part of the world, and every "conveyance on sale" of land wherever situated should be executed on stamped paper from Somerset House, or should bear British stamps. All this absurdity arises from the neglect of the principle of construction to which I have referred. If it be borne in mind, the obligations imposed by the Act are confined within reasonable limits, the determination of which involves no great difficulty. Least of all is there any room for doubt as to whether the present case comes within those limits. Even if we assume that the instrument in question was a "conveyance on sale," it was, as such, a wholly foreign transaction. It was executed abroad, and affected only property situated abroad. Following the principle of construction to which I have referred, s. 54 has no application to such an instrument. It is *alio intuitu*. To hold otherwise would not only involve giving a meaning to this particular section which would be ridiculous by reason of its breadth, but it would necessarily lead to similar absurd consequences in the case of most of the principal sections of the Act, because it would negative the only principle of interpretation which can save them from a like fate. I am therefore of opinion that, if this be taken as a "conveyance on sale" of the property referred to in it, it is not a conveyance to which s. 54 relates, and that therefore there is no obligation under the Act to stamp it with

the ad valorem stamp imposed on such conveyances under that section, and that therefore the decision of the Commissioners is erroneous.

Even if we are to hold that the terms of s. 54 include conveyances on sale of foreign property executed abroad, there would still remain a question of very considerable difficulty, namely, whether a French instrument of the character of that which we find in this case comes within the definition of a "conveyance on sale." It is a French instrument, and must be construed by French law. It is only by virtue of such law that it operates as a conveyance of the property. But by that law it does not constitute a sale, nor is the transfer of the property comprised in it absolute unless and until certain further acts are done. Whether in this state of facts such an instrument can be held to be a "conveyance on sale" under s. 54 is in my mind doubtful, but, as I hold that it is not necessary to decide the question, I give no opinion upon it.

There remain two points which require notice. In his argument for Maple & Co. Mr. Danckwerts cited cases to shew that documents of a dual character would according to English law be admitted in evidence, if proffered in a character for which they were adequately stamped, even though the stamp which they bore would not be sufficient to enable them to be received in some other character, and he urged that the respondents did not desire to use the document in question within this realm in its character of a conveyance, but only in its character of a contract to take shares, which would require a lower stamp than that fixed by the Commissioners. But s. 12, sub-s. 5, enacts that if an instrument be stamped in accordance with the decision of the Commissioners made upon application to them, it shall be admissible in evidence and available for all purposes, notwithstanding any objection relating to duty. This shews clearly that the Commissioners are bound to fix the amount that will render the document available for all purposes, and as this appeal is solely as to the correctness of their decision, we cannot consider whether a lower stamp would have made the instrument available for certain purposes only. I am therefore of opinion that this point is not relevant to the present case,

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The other point is the question as to whether the document is liable to stamp duty as being an undertaking or contract to take shares in an English company, but I understand that the respondents are willing to stamp it as such, and therefore this point does not require our decision.

FARWELL L.J. The Commissioners of Inland Revenue have decided under s. 12 of the Stamp Act, 1891, that ad valorem duty is payable on an "*acte d'apport*"—an instrument executed in Paris, and relating exclusively to property situate in France, but made between two English companies in consideration of the issue of shares in one of those companies to the other; and it has not been contested that the issue must be made in England, where the issuing company has its registered office. The Attorney-General contended that the Stamp Act, 1891, has imposed a duty on all conveyances unless the parties to be charged can bring themselves under s. 14, sub-s. 4; but this sub-section is no part of his case, as he founds his claim on the broad proposition that s. 1 imposes duty on all the documents described in the schedule, read with the apposite explanatory clauses in the Act, and that this is a conveyance as described in the schedule and in ss. 54 to 61.

In construing this Act, as in construing all documents, the Court must in my opinion read it as a whole, and ought not to extract two sections and say that on those sections the answer is clear, if the Act contains other sections which throw light on the meaning of words used in those two sections, and all the more when those words are general words. Further, there is in my opinion a presumption that the Legislature does not intend to impose taxes and penalties on persons who owe the State no allegiance, unless it be in respect of property situate or matters and acts happening and done within the jurisdiction: see the cases collected in Maxwell on Statutes, pp. 210, 211. (1)

Turning to the Act, I find that s. 12 provides that the Commissioners may be required to state whether any particular executed instrument is chargeable with duty or not, and if so with what amount. Sect. 14 provides the terms on which unstamped documents may

(1) The reference is to the 3rd edition; 4th edition, pp. 228, 229.

be produced in evidence in any Court in the United Kingdom, and sub-s. 4 provides that, "save as aforesaid, an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed." Sect. 15, sub-s. 2 (c), imposes a fine of 10*l.* and, in effect, double duty on the following instruments: "bond, covenant, or instrument of any kind whatsoever; conveyance on sale; lease or tack; mortgage, bond, debenture, covenant, and warrant of attorney to confess and enter up judgment; settlement." If the Attorney-General is right and the Court is to look at nothing but s. 1 and s. 54 and the schedule, the Commissioners are bound to answer in the case of every conveyance that it must be stamped with an ad valorem duty; and unless s. 14, sub-s. 4, can be read (as I think it ought to be read) as limiting the generality of the word "conveyance," they are equally bound in the same way with respect to conveyances coming within that sub-section, for the provision therein contained merely forbids the use of certain instruments therein mentioned as evidence unless they are properly stamped; it does not touch the fines imposed by s. 15, and I fail to see how on the Attorney-General's argument the Commissioners could say that a conveyance of American land between American citizens executed in America for a consideration payable there is not chargeable with an ad valorem duty here, inasmuch as, if he is right, the transferee is under s. 121 liable to fines here at the suit of the Attorney-General, although the Courts will under s. 14 allow him to use his deed as evidence in court.

I will not go through all the numerous instruments specified in the schedule; it is perfectly obvious that many of them can refer only to the United Kingdom—for example, the public officers mentioned in ss. 16 and 17, and the courts, inns, colleges, boroughs, &c., mentioned in ss. 18 and 19. Fletcher Moulton L.J. has already dealt with these other sections. I will go to s. 54, which defines "conveyance on sale," bearing in mind that the fines

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larger area in the case of conveyances than in that of contracts. I come to the conclusion, therefore, on the construction of ss. 1, 54 and 59 that the "acte d'apport," not being made in the United Kingdom and dealing solely with property locally situate out of the United Kingdom, is liable to no duty. But if this is so, s. 14, sub-s. 4, cannot impose any duty; it is not, and does not purport to be, a taxing section; it assumes that the instrument in question is otherwise taxable under the present or some earlier Act, for the last words are "unless it is duly stamped in accordance with the law in force at the time when it was first executed." The words "executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate in the United Kingdom" fit in with, and find their counterpart in, s. 59; the other "matter or thing" to be done has no equivalent in any of the fasciculus of clauses relating to conveyance on sale (see ss. 54 to 61); but there are many other dealings to which it can well refer.

This appears to me the true ground on which to rest my decision, and it is therefore unnecessary to consider the reasons on which Walton J. has based his judgment. I am, however, by no means satisfied on the face of the affidavit of the French *avocat* that the "acte d'apport" was in fact a conveyance on sale at all within the meaning of the Act. I agree that the appeal should be dismissed.

*Appeal dismissed.*

Solicitor for Commissioners: *Solicitor of Inland Revenue.*

Solicitors for Maple & Co.: *Peake, Bird & Collins.*

W. J. B.

C. A.

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Aug. 10.*

*Revenue—Income Tax—Company Resident in United Kingdom—Holding all the Shares in Company Abroad—Control—Income Tax Act, 1853 (16 & 17 Vict. c. 34), Sched. D.*

An English company carrying on business in the United Kingdom was the holder of all the shares in a foreign company :—

*Held*, that that fact alone did not make the business of the foreign company the business of the English company, so as to render the English company assessable to income tax under Sched. D. of 16 & 17 Vict. c. 34 upon the full amount of the profits made by the foreign company.

CASE stated by the Commissioners of Inland Revenue.

“At a meeting of the Commissioners for the General Purposes of the Income Tax Acts for the parish of St. Paul, Covent Garden, in the city of Westminster, held January 22, 1903, the Gramophone and Typewriter, Limited (hereinafter called the appellant company) appealed against an assessment under Sched. D. of the Act 16 & 17 Vict. c. 34, for the year ending April 5, 1902, of 79,348*l*.

The appellant company is an English company registered under the Companies Act, 1862 to 1898, having a registered office in the city of London.

The memorandum of association of the appellant company states (*inter alia*) that—

‘3. The objects for which the company is established are :

(11.) To acquire and take over, as a going concern, the business and undertaking carried on at 31, Maiden Lane, London, W.C., and elsewhere, under the style or firm of the Gramophone Company, Limited, and all or any of the assets and liabilities of the proprietors of such business and undertaking, and in connection therewith and with a view thereto, to enter into the agreement mentioned in clause 3 of the company's articles of association, and to carry the same into effect, with or without modification.

(12.) To carry on any other businesses, directly or indirectly, connected with the supply or employment of electricity, or capable of being conveniently carried on in connection with any of the

aforesaid objects, or calculated, directly or indirectly, to render profitable any of the property or rights of the company.

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(13.) To apply for, purchase, or otherwise acquire, any inventions, letters patent, patent rights, licences, or concessions for, or in relation to, any machines, instruments, novelties, articles, or things as aforesaid, and to use, exercise, develop, grant licences in respect of, and otherwise turn the same to account.

(17.) To purchase or otherwise acquire and undertake all or any part of the business, property, and liabilities of any person or company carrying on any business, which this company is authorized to carry on, or possessed of properties suitable for the purposes of the company.

(18.) To purchase or otherwise acquire, maintain, improve, manage, work, control, and superintend any business or businesses (wholesale or retail) which may seem directly or indirectly conducive to any of the company's objects, and to contribute to, subsidize, or otherwise assist or take part in any such operations.

(20.) To procure the company to be incorporated, registered, or otherwise recognized in any foreign State or any colony or dependency of the United Kingdom.

(21.) To enter into partnership, or into any arrangement for sharing profits, union of interests, reciprocal concession or co-operation with any person or company carrying on or about to carry on any business which this company is authorized to carry on, or any business or transaction capable of being conducted so as directly or indirectly to benefit this company, and to take or otherwise acquire and hold shares or stock in or securities of any such company, and to subsidize or otherwise assist any such company, and to sell, hold, re-issue, with or without guarantee, or otherwise deal with such shares or securities.

(26.) To sell the undertaking, property, and rights of the company, or any part thereof, for such consideration as the company may think fit, and in particular for shares, debentures, or securities of any other company, having objects altogether or in part similar to those of this company; and to promote any other company for the purpose of acquiring all or any of the property,

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rights, and liabilities of this company, or for any other purpose which may seem directly or indirectly calculated to benefit this company.

(35.) To establish, work, or discontinue agencies for the purposes of the company, or to act as agents for others.

(37.) To do all or any of the above things in any part of the world, and either as principals, agents, contractors or otherwise, and either alone or in conjunction with others, and either by or through agents, sub-contractors, trustees or otherwise.

(38.) To do all such other things as are incidental or conducive to the attainment of the above objects, whether of the like or other nature, or which may be calculated directly or indirectly to enhance the value of, or render profitable any business or property of the company, and so that the word "company" in this clause shall be deemed to include any partnership or other body of persons, whether incorporated or not incorporated, and whether domiciled in the United Kingdom or elsewhere.

4. The liability of the members is limited.

5. The capital of the company is 600,000*l.* divided into 100,000 preference shares of 1*l.* each, and 500,000 ordinary shares of 1*l.* each, with such respective rights as are defined by the articles of association registered therewith.'

In the articles of association it is provided (*inter alia*) as follows:

'6. The original share capital of the company shall be divided into 100,000 preference shares and 500,000 ordinary shares, all of 1*l.* each, having the respective rights and incidents hereinafter mentioned—that is to say: (a) The profits available for dividend in each year shall be applied first in paying to the holders of the preference shares a cumulative dividend at the rate of five per cent. per annum upon the amount paid up on the preference shares and any arrears of such dividend. The balance of such profits shall be divided among the holders of the ordinary shares. (b) On a winding-up, the assets available for distribution shall be applied: (1.) In paying to the holders of the preference shares any arrears computed to the date of the commencement of the winding-up of their cumulative dividend; (2.) in paying to such last-mentioned holders the amount paid up on the preference

shares held by them respectively, together with interest on such amount from the date of the commencement of the winding-up to the date of such payment; and (3.) the balance shall belong to the holders of the ordinary shares to the exclusion of the holders of the preference shares.

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53. The first general meeting shall be held at such time (not being more than four months after the registration of the memorandum of association of the company) and at such a place as the directors may determine.

54. Subsequent general meetings shall be held once in the year 1901, and in every subsequent year, at such time and place as may be prescribed by the company in general meeting, and if no other time or place is prescribed, at such time and place as may be determined by the directors.

94. The directors may from time to time appoint one or more of their body to be managing director, or managing directors, or secretary or managing director of any particular department of the company, either for a fixed term, or without any limitation as to the period for which he or they is or are to hold such office, and may from time to time remove or dismiss him or them from office, and appoint another or others in his or their place or places.

97. The directors may from time to time entrust to and confer upon a managing director or departmental managing director for the time being such of the powers exercisable under these presents by the directors as they may think fit, and may confer such powers for such time, and to be exercised for such objects and purposes, and upon such terms and conditions, and with such restrictions, as they think expedient, and they may confer such powers either collaterally with, or to the exclusion of, and in substitution for all or any of the powers of the directors in that behalf, and may from time to time revoke, withdraw, alter, or vary all or any of such powers.

107. Without prejudice to the general powers and the other powers conferred by these presents, it is hereby expressly declared that the directors shall have the following powers, that is to say, power—(a) To purchase, or otherwise acquire for the company, any property, rights, or privileges which the company is authorized to acquire, at such price, and generally on such



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terms and conditions as they think fit. (b) At their discretion to pay for any property, rights, or privileges acquired by, or services rendered to the company, either wholly or partially in cash, or in shares, bonds, debentures, or other securities of the company; and any such shares may be issued, either as fully paid up, or with such amount credited as paid up thereon as may be agreed upon, and any such bonds, debentures, or other securities may be either specifically charged upon all or any part of the property of the company and its uncalled capital, or not so charged. (d) To appoint and at their discretion remove or suspend such managers, secretaries, officers, solicitors, bankers, clerks, travellers, agents, and servants for permanent, temporary, or special services as they may from time to time think fit, and to determine their duties, and fix their salaries or emoluments, and to require security in such instances and to such amount as they may think fit.

108. The directors may from time to time provide for the management and transaction of the affairs of the company abroad or in any specified locality in the United Kingdom, in such manner as they think fit, and the provisions contained in the next following clause shall be without prejudice to the general powers conferred by this clause.

109. The directors from time to time, and at any time, may establish any local board or agency for managing any of the affairs of the company abroad or in any specified locality in the United Kingdom, and may appoint any persons to be members of such local board or managers or agents, and may fix their remuneration; and the directors from time to time or at any time may delegate to any person so appointed any of the powers, authorities and discretions for the time being vested in the directors other than their power to issue capital, and may authorize the members for the time being of any such local board, or any of them, to fill up any vacancies therein, and to act notwithstanding vacancies, and any such appointment or delegation may be made on such terms and subject to such conditions as the directors may think fit, and the directors may at any time remove any person so appointed and may annul or vary any such delegation.

122. The directors shall cause true accounts to be kept of the sums of money received and expended by the company, and the matters in respect of which such receipt and expenditure take place, and of the assets, credits and liabilities of the company. The books of account shall be kept at the office, or at such other place or places as the directors think fit, and shall be made up annually to June 30.

124. At the ordinary general meeting in every year, but not at the first ordinary general meeting, the directors shall lay before the company a balance-sheet containing a summary of the property and liabilities of the company made up to June 30 prior to the ordinary general meeting to be held in that year.

125. Every such statement shall be accompanied by a report of the directors as to the state and condition of the company, and as to the amount which they recommend to be paid out of the profits by way of dividend or bonus to the members, and the amount (if any) which they propose to carry to the reserve fund, and the balance-sheet shall be signed by two directors and countersigned by the secretary.'

The directors of the appellant company, in accordance with the requirements contained in the articles of association of the same company, presented their report to their shareholders for the year ending June 30, 1901. From that report a total credit balance appears of 79,348*l.* 10*s.* 10*d.*, which balance was appropriated in manner set forth in the report, and the whole of which balance was included in the assessment now appealed against.

It was admitted on the hearing of the appeal that the whole of the sum of 79,348*l.* 10*s.* 10*d.* was liable to be taxed under Sched. D except as to 15,000*l.*, part thereof, a sum stated in the report to have been transferred "to patents account, Germany, in accordance with German law."

This sum of 15,000*l.*, transferred to patents account to meet the requirements of the German law, concerns the appellant company in respect of their interest in the German company hereinafter referred to.

The Deutsche Grammophon Aktiengesellschaft, herein referred to as the German company, was registered on January 30, 1900,

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and amongst those who united in forming it were the Gramophone Company, Limited.

The German company was constituted on January 30, 1900, under a deed of association, a joint stock company with limited liability in conformity with the German law, with its head office in Berlin.

The German company was formed by union of three other companies and two individuals, with a capital of 1,000,000 marks. . . .

The constitution of the German company is contained in art. 12, which provides that :—

‘The official bodies of the company are (a) the general meeting of shareholders ; (b) the board of supervision ; (c) the board of management.’

Then follow details as to the powers vested in the general meeting of shareholders, which are very similar to those vested in shareholders present at a general meeting of an English company.

Article (19.) provides (inter alia) that at the ordinary general meeting ‘the board of supervision must make a report as to the examination of the annual account and balance-sheet and the proposals as to the distribution of the profits.’

Article (20.) provides that the general meeting has to decide—  
‘(4) Upon the amalgamation of the company with other companies. (7) Upon the distribution of the profits amongst the shareholders for the past business year.’

The board of supervision is constituted by the following articles :—

‘21. The board of supervision consists of five members. The first board of supervision holds office during the legal period. Subsequently it will be elected up to the close of that general meeting which passes a resolution upon the balance-sheet for the fourth business year after its appointment ; the business year in which the appointment takes place is not included therein. Meanwhile one member retires every year. The names of the retiring members shall in the first years be determined by lot, but afterwards in the order in which they came into office, and in case of equal periods of office, by lot. A retiring member is at

once re-eligible. If a member retire during his period of office those who remain shall compose the board of supervision, so long as there are still three members left. The substitute to be elected at the next general meeting shall be elected for the remainder of the term of office of the member who has retired. If before the expiration of the period of office so many members have retired that there are no longer three left, a general meeting must at once be convened for a new election.

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22. The board of supervision shall elect annually at its first meeting a president and a deputy. Revocation is permissible. The deputy president has, when acting as representative of the president, the same rights as the latter.

23. Documents which are executed by the board of supervision shall be deemed to be duly signed if they bear the signature of the president or his deputy.

24. The meetings of the board of supervision, to which the members of the board of management are also to be invited, shall be convened by the president or his deputy by notice in writing. They must be convened within two weeks, if demanded by a member of the board of supervision or by a member of the board of management. Resolutions of the board of supervision can also be passed by obtaining written or telegraphic votes.

25. The resolutions of the board of supervision shall be passed by a simple majority, and in case of equality of votes, the president or his deputy shall have a casting vote. The board of supervision shall have the right at any time to watch over the whole of the management of the business by the board of management, and therefore to inspect all books and papers of the company. The board of supervision is also entitled to appoint individual members of the board of supervision to perform the above-mentioned work.

26. The board of supervision shall receive, by way of remuneration for its services, a fixed remuneration of 2000 marks for each member, to be entered amongst the business expenses. As to the distribution of the remuneration and of the percentage amongst its members, it shall decide independently, paying regard to the special service of individual members. Each member shall have his cash disbursements refunded to him.'



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The board of management is constituted by the following articles :—

‘27. The board of management consists of one or more members. It is elected by the board of supervision. But the first board of management is elected by the constitutive general meeting. Each member of the board of management is entitled, alone, to represent the company. In the event of a member of the board of management being temporarily prevented from acting, or retiring, the board of supervision may appoint one of its members to act as substitute of any ordinary member of the board of management, for a period limited in advance. Holders of procurations shall be appointed jointly by the board of management and by the board of supervision. Only a joint procuration may be granted to them. The duration and the other conditions of the appointment of managers and the remuneration and percentage of the net profits of the company to be granted to them shall be fixed by the board of supervision by an agreement to be entered into with them.

28. The board of management is bound to obtain the consent of the board of supervision in the following cases :—(1.) In acquiring or parting with real property, if the value thereof exceeds 15,000 marks ; (2.) in granting or cancelling mortgages, ground charges, or other incumbrances, on real property, to an amount exceeding 15,000 marks ; (3.) in making structural alterations and new buildings to the value of upwards of 15,000 marks ; (4.) with regard to machinery or plant to the value of upwards of 15,000 marks ; (5.) in appointing and dismissing those members of the staff of the company who receive an annual salary of more than 5000 marks ; (6.) in establishing branches and commandite partnerships.

29. Documents and declarations in writing are legally binding on the company if they are signed with the name of the company, and also bear the signature of a member of the board of management or of a deputy or of two procuration holders.’

The balance-sheet and distribution of profits is to be prepared and made in accordance with the following articles :—

‘30. The business year comprises the period from September 1 to August 31 of the following year. The first business year extends

from the day of the registration of the company to August 31, 1900. The board of management has to determine every year, with the sanction of the board of supervision, how much shall be written off annually from the book value of the immovable and movable property. With regard to the depreciation of the patents, at least one-third of the working profit remaining after deduction of all the business expenses shall, before anything is written off the immovable property, be devoted to writing off amounts on patents or similar accounts. The balance-sheet is to be made up to August 31. It must be prepared, together with a profit and loss account and a report on the accounts, setting forth the state of the property and the circumstances of the company, at latest by November 30 in each year, and it must be lying for the inspection of the shareholders, together with the remarks of the board of supervision, at the business premises of the company, at least two weeks before the ordinary general meeting.

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31. In order to cover any loss shown by the balance-sheet, a reserve fund is to be formed, to which at least 5 per cent. of the annual net profit shall be carried, so long as the reserve fund does not exceed one-tenth of the capital.

32. The formation of special reserve funds, especially for the purpose of extraordinary expenditure or to cover losses or to make up dividends or for other purposes, may be resolved upon by the general meeting.

33. The net profit remaining, after writing off all depreciation and setting aside all reserves and carrying forward any sum to new account, shall be distributed as follows: (1.) In the first place the shareholders shall receive a dividend up to 4 per cent. on the paid-up share capital; (2.) the board of supervision shall then receive a percentage of 6 per cent. of the remainder; (3.) the rest shall be distributed as a further dividend. The percentage of the board of management can only be granted and awarded on the net profit remaining after deducting all sums written off and set apart for reserves.'

The appellant company now holds all the shares of the German company, and the members of the board of management of the German company are also directors of the appellant

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company, and the members of the board of supervision of the German company are nominees of the appellant company.

The German law applicable to a company is contained in the German code.

The German code, translated from the official text by Bernard A. Platt, Barrister-at-law, was annexed to and formed part of the case.

In the report of the directors of the appellant company the whole of the profits of the German company are brought in in one sum, but the board of management of the German company have set aside and transferred to their patents account, the sum of 15,000*l.*, which amount is equivalent to the deterioration during the year of the value of the patents purchased by the German company, since these patents at the time of the constitution of the German company had three years to run. This sum of 15,000*l.* is provided out of the earnings of the German company.

It was contended on behalf of the appellant company: (1.) That the sum of 15,000*l.* transferred to the patents account, in conformity with the German law by the German company, is not chargeable with income tax; that the sum of 15,000*l.* was not profits of the appellant company, inasmuch as there was no resolution in general meeting of the German company for the distribution of this sum among the shareholders, and by the German law this sum could not be so distributed; and (2.) that the sum of 15,000*l.* was not profits or gains at all within the meaning of the Income Tax Acts, either of the German company or the appellant company.

The Commissioners held (1.) that the English company controlled the German company from England, and that the head and seat and directing power of the appellant company were at the appellants' registered office in London; (2.) that the entire business of the German company was carried on by and was the business and property of the appellant company, and that the profits of the German company were the profits of the appellant company; that this sum of 15,000*l.* was profits of the appellant company within the meaning of the Income Tax Acts; and further that all the profits of the German company should

be assessed without regard to the mode of application of such profits; and they confirmed the assessment."

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*Dauckwerts, K.C.* (*R. Vaughan Williams* with him), for the appellant company. The German company is bound by law to put apart certain sums for depreciation of patents. The English company can only draw from the German company the amount of profits which are actually distributed by that company. The English company, although it holds all the shares, is nevertheless only a shareholder in the German company. The two companies are distinct legal persons: *Salomon v. Salomon* (1); and the English company cannot be held chargeable in respect of the whole amount of profit made by the German company, but only in respect of so much as is actually received by the English company. [He referred to *Reg. v. Arnaud* (2); *Browne v. Collins* (3); *Orr v. Glasgow Ry. Co.* (4); *Foster v. Commissioners of Inland Revenue* (5); *Kodak, Ltd. v. Clark*. (6)]

*The Attorney-General* (*Sir J. Lawson Walton, K.C.*) (*Rowlatt* with him), for the Crown. The whole amount of the profit has been earned and received by the German company, and since all the shares in that company are held by the English company, the English company is chargeable in respect of the whole amount of the profits. The fact that a certain amount of those profits has been carried to a depreciation fund is immaterial. If it were otherwise, a company, by placing the whole of its profits for any year to capital account, would escape payment of income tax on its receipts for that year. The German company was entirely under the control and management of the English company. [He referred to *Apthorpe v. Peter Schoenhofen Brewing Co.* (7); *S. Louis Breweries v. Apthorpe* (8); *San Paulo (Brazilian) Ry. Co. v. Carter* (9); *United States Brewing Co. v. Apthorpe* (10); *Colquhoun v. Brooks*. (11)]

(1) [1897] A. C. 22.

K. B. 505.

(2) (1846) 9 Q. B. 806.

(7) (1899) 80 L. T. 395; 4 Tax

(3) (1871) L. R. 12 Eq. 586.

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(4) (1860) 3 Macq. 799.

(8) (1898) 79 L. T. 551.

(5) [1894] 1 Q. B. 516.

(9) [1896] A. C. 31.

(6) [1902] 2 K. B. 450; [1903] 1

(10) (1898) 4 Tax Cases, 17.

(11) (1889) 14 App. Cas. 493.



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*Dankwerts*, in reply, referred to *Bartholomay Brewing Co. v.*

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Aug. 10. WALTON J. This is an appeal from a determination of the Commissioners of Income Tax, and comes before me upon a special case.

The facts upon which this question arises are set out in the case, but I shall state them quite shortly and in chronological order, which I think will make them more intelligible. On January 30 in the year 1900 a company, which I shall call the German company, was incorporated and registered in Germany in accordance with German law, and amongst those who united in forming it was the Gramophone Company, Limited. The German company was constituted under a deed of association a joint stock company with limited liability in conformity with German law. My attention was called to the provisions of the German law, and although, of course, they are not identical with the English law on the subject of limited liability companies, I think their effect is that the German company, constituted in the way which I have described, was a corporation in the same sense, and for all the purposes of the present case as an English limited liability company.

I may refer to Article 178 of the German Commercial Code, which provides that: "All the members of a limited liability company participate in the share capital of the company without being held personally liable for the obligations of the company." Article 210 says: "A limited liability company has, as such, rights and duties; it can acquire real property and other rights over real property, sue and be sued." Article 211 says: "The obligation of a shareholder is limited to payment of the nominal value of his share, and the issuing price when such price is above its nominal value." Article 213 is: "Shareholders cannot demand back their money; they have only a right during the duration of the company to net profit, unless such distribution is prohibited either by the law or by the Articles." Referring to the articles of association, which are annexed to

the case, and to some extent set out in the special case, I find that by art. 12 the official bodies of the company are: (a) The general meeting of shareholders; (b) the board of supervision; and (c) the board of management. By art. 30 of the articles of association, the business year comprises the period from September 1 to August 31 of the following year. "The board of management has to determine every year, with the sanction of the board of supervision, how much shall be written off annually from the book value of the immovable and movable property. With regard to the depreciation of the patents, at least one-third of the working profit remaining after deduction of all the business expenses shall, before anything is written off the immovable property, be devoted to writing off amounts on patents or similar accounts. The balance-sheet is to be made up to August 31." Then, after some further regulations with regard to the balance-sheet, by art. 33 it is provided: "The net profit remaining, after writing off all depreciation and setting aside all reserves and carrying forward any sum to new account, shall be distributed as follows: (1.) In the first place the shareholders shall receive a dividend up to 4 per cent. on the paid-up share capital; (2.) the board of supervision shall then receive a percentage of 6 per cent. of the remainder; (3.) the rest shall be distributed as a further dividend." The effect of all this is—and I do not think I need go into any further detail for the purposes of this case—that the constitution of a German limited liability company is very similar to that of an English limited liability company, and the position of the shareholders and their relation to the company are very similar in principle to those of the shareholders of an English limited liability company in their relation to the company. The property of the company is not the property of the shareholders; it is the property of the company. The interest of the shareholders in profits is not an interest in the actual profits of the company directly, but an interest only in such dividends as may be from time to time declared.

The German company, as I have stated, was constituted on January 30, 1900, and one of the founders was the Gramophone Company, Limited. On December 10, 1900, the appellant company

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was registered, and one of its objects was to acquire and take over as a going concern the business and undertaking of the Gramophone Company, Limited, and all or any of the assets and liabilities of the proprietors of such business and undertaking. The appellant company did, as I understand, take over the assets, business, and undertaking of the Gramophone Company, Limited, and no doubt in so doing took over a large interest which the Gramophone Company, Limited, had in the German company. The result is thus stated in the case: "The appellant company now holds all the shares of the German company, and the members of the board of management of the German company are also directors of the appellant company, and the members of the board of supervision of the German company are nominees of the appellant company,"—nominees as I understand, in this sense: that as the appellant company holds in its own name, or the names of its nominees, all the shares of the German company, they have a controlling voice in the election of all officers of the German company.

In the year in question the total profits of the German company amounted to 79,348*l.* 10*s.* 10*d.* On the hearing of the appeal by the Commissioners it was admitted "that the whole of the sum of 79,348*l.* 10*s.* 10*d.* was liable to be taxed under Sched. D, except as to 15,000*l.*, part thereof, a sum stated in the report to have been transferred 'to patents account, Germany, in accordance with German law.' This sum of 15,000*l.* transferred to patents account to meet the requirements of the German law, concerns the appellant company in respect of their interest in the German company hereinafter referred to." That is to say, the German company, in making up its balance-sheet for the year in question, stated its total profits as 79,348*l.*, but of that amount 15,000*l.* was, in accordance with the regulations which I have read, transferred to a depreciation fund with reference to the patent rights belonging to the German company.

The question is whether the appellant company is chargeable to income tax in respect of that 15,000*l.* The appellant company have no doubt received their dividends arising from the profits of the German company; but the English company has not received this sum of 15,000*l.* It is

part of the profits made by the German company; but it is an amount which has not been distributed as dividend by that company, but has been placed to reserve to meet depreciation. The question is whether the English company is chargeable in respect of that 15,000*l.* It is said that, inasmuch as the English company owns all the shares of the German company, the business of the German company is the business of the English company, and therefore that the profits of the German company, the 79,348*l.* 10*s.* 10*d.*, are profits earned by the English company. In the case of *Kodak, Ld. v. Clark* (1) a similar question to this arose. The cases bearing upon questions of this kind were in that case very fully considered by Phillimore J., and I do not think it is necessary for me to refer to them now. I do not think the case of *Kodak, Ld. v. Clark* (1) decides the present question. It seems to me there may be found dicta in the judgments of Phillimore J. and of the Court of Appeal which appear sometimes in favour of one side and sometimes rather in favour of the other, upon the very point which I have now to determine, but it seems to me they do not bind me. There are two questions involved in the present case. Those two questions are: Whose was the business carried on by the German company? Was it the business of the English company? If it was not the business of the English company, then it seems to me that this appeal must be allowed. But even assuming that it was the business of the English company, then it would be necessary to consider whether that business was controlled or managed by the appellant company in England. If it was their business, and if it was controlled by the appellant company from England, then they would be chargeable in respect of the profits of the foreign business to income tax in England. The important question here seems to me to be this: Was the business of the foreign company the business of the appellant company? There is no doubt that a person in England (I include in the term "person," of course, a company) may be the owner of a commercial undertaking in a foreign country. Such person in England may carry on the foreign business by means of an agent abroad. The agent abroad

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(1) [1902] 2 K. B. 450; [1903] 1 K. B. 505.



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may be a company, and the owner of the business in England may be a shareholder in that company. If that be so, then the business abroad is the business of the person in this country, notwithstanding that the business abroad is carried on by a foreign company. But in such a case one has throughout this fact, that the business abroad is the business of the person in this country. Was that so in this case? What evidence is there of it? To my mind there is no evidence that the business of the German company was the business of the English company except the fact that the English company has become the owner of all the shares in the German company. That does not extinguish the German company. The German company is an existing person and a different entity from the English company, and I think that the effect of the judgment of the House of Lords in the case *Salomon v. Salomon* (1) is that the fact that the shares of the German company all belong to the English company does not make the German company a mere alias, or a trustee, or an agent for the English company, or for the shareholders in the English company. I do not think I should be usefully occupying time by reading passages from the judgments in that case, but I might refer to what Lord Herschell says at the bottom of pp. 42 and 43. It seems to me that there is nothing here upon which I can find that the business of the German company is the business of the English company except the fact that the shares of the German company now all belong to the English company. The effect of that is to make the shareholders in the English company the owners of all the shares in the German company; but it still leaves their relationship to the German company that of shareholders to the company, and does not constitute that company their agent or trustee. That seems to me to have been clearly decided in the case of *Salomon v. Salomon* (1), and, therefore, I do not think that there is any evidence to shew that these profits were the profits of the appellant company. They had an interest in them and upon that interest they have been taxed, and there is no dispute as to that. To that extent, no doubt, they are

(1) [1897] A. C. 22.

liable. Beyond that, it appears to me they are not liable, and, therefore, this appeal should succeed.

*Judgment accordingly.*

Solicitors for appellants: *Broad & Chester.*

Solicitors for respondent: *The Solicitor of Inland Revenue.*

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[IN THE COURT OF APPEAL]

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Aug. 1, 2.

*Bill of Sale—Validity—Deviation from Statutory Form—Chattel Interest in Land—Assignment of Lease included in Inventory of Chattels—Bills of Sale Act (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), s. 9.*

By a bill of sale the mortgagor assigned to the mortgagee as security for an advance "the chattels and things" specifically described in the schedule thereto "and now being in and about the dwelling-house and premises known as the Lion Hotel, Farningham." The schedule contained a list of articles about the premises, and it concluded with the following item: "Assignment dated January 24 1902" (the parties being stated) "of lease dated November 13 1891 of the said Lion Hotel and all the muniments of title referred to in the said assignment."

*Held* by Vaughan Williams and Romer L.JJ., reversing the judgment of the Divisional Court (Cozens-Hardy L.J. dissenting), that the bill of sale did not create a charge upon the leasehold interest, and that it was made in accordance with the statutory form.

*Cochrane v. Entwistle*, (1890) 25 Q. B. D. 116, distinguished.

APPEAL from a decision of the Divisional Court, reversing the decision of the county court judge at Dartford, Kent.

The plaintiffs had recovered judgment for a debt in the county court against the defendant, who was the proprietor of the Lion Hotel, Farningham, and had put in an execution. James Gillespie made a claim against the goods taken in execution by virtue of a bill of sale of which he was the transferee, and this claim was disputed by the plaintiffs. An interpleader summons was then taken out to determine the validity of the claim.

The bill of sale in question was dated January 5, 1904, and was made between the defendant, thereafter called the mortgagor,

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of the one part and A. W. Carpenter, trading as the Charing Cross Bank, thereafter called the mortgagee, of the other part, and thereby the mortgagor assigned to the mortgagee, his executors, administrators and assigns, "all and singular the several chattels and things specifically described in the schedule hereto annexed and now being in and about the dwelling-house and premises known as the Lion Hotel Farningham in the county of Kent" to secure the payment of an advance of 300*l.* and interest thereon at 30 per cent. The bill of sale contained a proviso that the chattels and things thereby assigned should not be liable to seizure or to be taken possession of by the mortgagee for any cause other than those specified in s. 7 of the Bills of Sale Act (1878) Amendment Act, 1882, and also a proviso that if the chattels and things thereby assigned should be seized or taken possession of by the mortgagee in consequence of the breach of any of the covenants therein contained the mortgagee should be at liberty to remove or sell the same or any part thereof by public auction at the expiration of five clear days from the day of such seizure or taking possession. The schedule contained a long list of articles in and about the hotel, and it concluded as follows: "Assignment dated 24th January 1902 (between Walter Edward Lovegrove and Edward Richard Lovegrove of the first and second parts and the grantor of this bill of sale Edmund Basil Denton of the third part) of lease (dated 13 November 1891) of the said Lion Hotel Farningham Kent aforesaid and all the muniments of title referred to in the said assignment."

This bill of sale was duly registered on January 6, 1904.

On December 19, 1904, the bill of sale was transferred to the claimant.

The question was whether the inclusion in the enumerated chattels of the assignment of the lease of the hotel, and the title deeds relating thereto, avoided the bill of sale. At the trial before the county court judge it was stated that all these deeds were handed over to the grantee of the bill of sale shortly after the time of its execution, but there was no evidence as to the circumstances under which the alleged delivery of the deeds took place. The county court judge held that the bill of sale did not create any charge on the property which was the

subject-matter of the deeds mentioned in the schedule, and he therefore held that the bill of sale was not open to objection as including a chattel interest in real estate, and decided in favour of the claimant. On appeal by the plaintiffs the Divisional Court (Lord Alverstone C.J., Kennedy and Ridley JJ.) reversed this decision, and held on the authority of *Cochrane v. Entwistle* (1) that this bill of sale, by including in the schedule the deeds in question, created an equitable charge on the land and was consequently void.

The claimant appealed.

*G. F. Hohler* and *J. G. Joseph*, for the appellant. The only objection raised to the validity of this bill of sale is that it includes in the schedule of articles comprised in the security the title deeds of certain leasehold property. If the inclusion of those deeds in the schedule created a charge on the land, then no doubt the bill would not be in the form required by the Bills of Sale Acts; but no such charge is created. If the holder of the bill of sale were to apply to a Court of Equity for a declaration that he had an equitable charge on the leasehold interest, and for an order for sale on that footing, his application would fail. Title deeds may be treated as personal chattels, and may be given away by the owners without conferring any estate on the land to which they relate: *Barton v. Gainer* (2); *Sheppard's Touchstone*, 242; *Burton's Compendium*, s. 476; and see *Rummens v. Hare*. (3)

[ROMER L.J. referred to Williams on Personal Property, 15th ed. p. 124, and to *Goode v. Burton*. (4)]

Upon the construction of this bill of sale, taken as a whole, it is clear that the intention of the parties was not to create a charge upon the leasehold interest. In the operative part the assignment is of "chattels and things now being in or about the hotel." That language is not appropriate to charge the hotel itself. *Cochrane v. Entwistle* (1), on which the Divisional Court relied, is not in point, because as a matter of construction it was obvious that the intention of the parties in that case was

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(1) 25 Q. B. D. 116.

(3) (1876) 1 Ex. D. 169.

(2) (1858) 3 H. &amp; N. 387.

(4) (1847) 1 Ex. 189.



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*J. B. Matthews* for the respondents, the plaintiffs. Title deeds savour of the land, and until they are completely divorced from the land to which they relate they cannot become personal chattels. Regarded merely as parchment and wax, they have no assignable value. In *Barton v. Gainer* (3) the gift was not of title deeds but of railway debentures. In *Casberd v. Attorney-General* (4) it was elaborately argued that a deposit of deeds by way of security did not create a charge on the land, but merely passed the parchment; but the Court overruled that argument, and held that a charge was created on the land. The fair inference to be drawn from the language of this bill of sale is that the parties intended to charge the leasehold interest, and this inference is strengthened by the circumstance that the deeds were handed over to the mortgagee.

*Hohler*, in reply.

VAUGHAN WILLIAMS L.J. This is an unusual case and not a very easy one to decide, and my difficulty in dealing with the matter is not lessened by the fact that we are here reviewing the unanimous decision of the Lord Chief Justice and two other judges. The question is whether a bill of sale given to a money-lender is void or not, and the real question arises upon the construction of the schedule to the bill of sale. When one looks at the schedule one sees what the security given by the grantor of the bill of sale is. If that security includes a chattel interest in land the bill of sale is void. If, on the other hand, the security includes chattels only, it is good. I need hardly say that this bill of sale must be construed according to the ordinary rules of construction. It makes no difference that the document to be construed is a bill of sale and is a bill of sale originally given to a money-lender. I have read the judgment of the Lord Chief Justice, and it appears to me that in substance his decision is based on the case of *Cochrane v. Entwistle*. (5) That was a bill

(1) (1855) 20 Beav. 583.

(3) 3 H. & N. 387.

(2) (1888) 13 App. Cas. 506.

(4) (1819) 6 Price, 411, 457.

(5) 25 Q. B. D. 116.

of sale case and the bill of sale had a schedule as in this case. The schedule in that case begins by setting out certain chattels, the property of the grantor, a farmer, and all the earlier part of the schedule refers to chattels only, but the schedule concludes with these words, "together with all the tenant right, valuation, goodwill, tillages, and interest of the mortgagor in and to the farm known as Poultney Lodge Farm." In that case, therefore, there can be no doubt that the bill of sale dealt with a chattel interest in land by reason of the concluding words in the schedule. That case does not assist in the decision of the present case at all, because in this case the whole question is whether upon the true construction of this bill of sale there was given as part of the security an interest in land as distinguished from an interest in chattels. Well, now, in construing this bill of sale and the schedule thereto, one must look at the whole of the instrument and ascertain what is the intention of the grantor and grantee as expressed in the words of this document. [The Lord Justice read the assignment and the proviso at the end of the bill of sale.] The conditions, the breach of which is referred to in that proviso, are what I may call the statutory conditions mentioned in the Act of Parliament. In truth and in fact this bill of sale is in the very form provided by the Act. Taking all these matters into consideration, the question is whether these parties intended merely to give a security on the articles included in the schedule as chattels, or to include also a chattel interest in land. The schedule concludes with these words. [The Lord Justice read the concluding paragraph of the schedule.] It is said that the intention of this document, having regard to that item which I have just read at the end of the schedule, was really to give the grantee a charge on the land—a charge which he could have enforced in a court of equity. One therefore has to put to oneself this question. Suppose the grantee of this bill of sale had gone to a Court of Equity and had asked the Court by declaration or otherwise to deal with this document as creating in equity a charge on this land. Can it be said he would have succeeded? Would not the grantor have been entitled to say in answer to any such claim, "Look at the wording of this document. It is manifest that it was my intention and the intention

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of the grantee not to create a charge on land but simply to create a security on the assignment itself and not the land the subject-matter of the assignment." One of the consequences of this document being treated in equity as a document creating in favour of the grantee a charge on this land would have been that the grantee might have applied for an order for the sale of this property. It would have been a complete answer to that application to have referred to the proviso at the end of the bill of sale, because that proviso provides for a sale by public auction at the expiration of five clear days from the day of seizure or taking possession. It would have been quite unnecessary to get an order for sale, because with reference to that which was intended to be the subject-matter of this security, there was a proviso inserted whereby these two men, both of whom were sui juris, agreed that there should be a power of sale. Is not the very fact of the inclusion in the bill of sale of such a power a strong reason for construing this instrument as only intending to give a security on the document qua document and not on the land, especially when one takes into consideration the whole body of the bill of sale, which purports only to deal with goods and chattels, these goods and chattels being specified in the schedule?

An argument was based on the fact that possession of these deeds was taken by the grantee, and taken, it was said, contemporaneously with the execution of the bill of sale. We have no evidence before us as to the circumstances in which that was done, and, in my opinion, it does not affect the construction of this instrument. If the grantee had said that this instrument did not represent the true transaction between the parties, it might have been necessary to consider the fact of possession of the document having been taken by the grantee, but that is no part of the grantee's case here. Something was said, and justly said, as to what inference we ought to draw from the use of the words "and all the muniments of title referred to in the said assignment." As I read these words, they are only part of the enumeration of the chattels the subject of this bill of sale. Then it is said that we cannot read this instrument in this way, because the deeds so savour of realty that the assignment of this lease together with the muniments of title must have been

intended to give an interest in land. That might be a very strong argument if it were a true proposition of law that documents of title cannot be severed from the land, but the decision in *Barton v. Gainer* (1) is, in my opinion, an authority to the contrary. In that case two debentures were handed over to the defendant by a testator, and the question was, whether an action of detinue by the testator's executors against the defendant ought to succeed or not. It was said that no property passed in respect of those debentures, but Pollock C.B. in the course of the argument said, "The owner may by grant sever the title deeds from an estate"; and Martin B. said, "In Sheppard's Touchstone p. 242 it is said 'A man may give or grant his deeds, i.e., the parchment, paper and wax, to another at his pleasure, and the grantee may keep or cancel them. And, therefore, if a man have an obligation he may give or grant it away, and so sever the debt and it.'"

It is of course well known that as a matter of fact deeds are not infrequently handed over not for the purpose of dealing with the subject-matter of the deeds but for the purpose of giving the person with whom the deeds are deposited what is called a "sit upon" title. I only cite *Barton v. Gainer* (1) for the proposition that an owner may separate his deeds from his estate and may grant the deeds merely as documents as a security, and that in such a case it may be the intention of the parties not to bind the subject-matter of the deeds. Taking all these matters into consideration, I think myself, with all deference to the Lord Chief Justice and his colleagues, that, construing this instrument according to ordinary rules of construction and without regard to the fact that the grantee was a money-lender, we ought to arrive at the conclusion that it was not the intention of the parties to make an interest in land a parcel of the security, and that upon the true construction of this bill of sale the grantee does not take under it any equitable charge on the land. The appeal must therefore be allowed.

ROMER L.J. I am greatly indebted in this case to counsel for their full and able arguments. But for those arguments I think

(1) 3 H. & N. 387.

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I might have arrived at an erroneous conclusion. For a long time I was strongly under the impression that the appellant was wrong and that the view taken by the Divisional Court was right; but on a further consideration I have arrived at the conclusion that the appeal ought to succeed. The whole question really turns on the true construction of this bill of sale so far as concerns the title deeds mentioned in the schedule. If the effect of the bill of sale was to create a charge on the land the subject-matter of the title deeds, then the appellant is clearly wrong. If, on the other hand, the effect of the bill of sale was not to create a charge on the land but only to pledge the title deeds as documents, then the appellant is right. For although title deeds savour of realty and are the symbols, if I may so describe it, of the land to which they relate in the hands of the owner, yet it is quite possible for the owner to sever the title deeds from the land and to deal with them as so many pieces of paper and pledge them accordingly; and in that case they come within the description in the Bills of Sale Act, 1878, s. 4, of "articles capable of complete transfer by delivery." I am far from saying that the documents themselves would be valueless in the hands of the pledgee, for though the mere documents may have little or no intrinsic value, they might have a value to the pledgee inasmuch as the owner of the land might wish to recover them, and would be forced to pay the pledgee to get them back. Therefore the question is, was it intended to create a charge on the land or was it only intended to give a charge on the documents not as charging the land but as conferring by virtue of the assignment under the bill of sale the right to hold the documents for what they were worth. Now seeing that the title deeds savour of realty and are the symbols of the land to which they relate, I quite agree that in an ordinary case you might well infer an intention to give a charge on the land, though the instrument itself might only refer to the title deeds and not to the land, or though there might be no instrument at all. Take first the case where no instrument is used at all, the case of an owner merely pledging the title deeds to secure an advance, and nothing more. I should infer that the object and interest of that transaction was to charge the land; and further, I have no doubt that if the

owner of the land possessing the deeds were to retain them and were to sign an instrument declaring in that instrument that he held the deeds as security for the sum advanced, I should again infer that the object was to charge the land ; and similar cases might be given. But after all it is a question of what is to be inferred from a consideration of the instrument and the surrounding circumstances. Now, having made these preliminary observations, I will shortly deal with the bill of sale itself. In the first place it is something to be borne in mind that it is a bill of sale. I do not think that is a circumstance to be overlooked. It is a document purporting to be a bill of sale securing money advanced upon chattels and things. And if you look at the assignment you find that what is assigned is nothing but what is described as "chattels and things." Then if you turn to the schedule all the items except the last are undoubtedly chattels of the ordinary kind. Then you come to this last item, and how is that item described ? It is described as an assignment by certain persons to certain others there enumerated of the lease of a certain house and the title deeds referred to in that assignment. In my opinion what is there referred to is a document. The assignment must be a document. It is a document which follows a whole series of chattels in a bill of sale, which one would expect to deal only with chattels, and which in the assignment describes the subject-matter of the bill of sale as chattels and things. The matter does not stop there because there is a power of sale, and when one reads that power of sale it is difficult to suppose that it was intended to cover the land itself. It would clearly be departing from the words of that power of sale if you were to attempt to include in it anything except the chattels properly so called, that is to say, if you were to attempt to include in it the land itself. Taking the instrument as a whole, I ask myself this : Suppose the bill of sale holder had immediately after its execution come to a Court of Equity and claimed a charge on the land itself, would he have succeeded ? In my opinion he would not. I think the Court would have come to the conclusion on the instrument as a whole, having regard to what I have already said, that it was not the intention of the parties as appearing from this instrument that any charge should be created on the land

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with the usual consequences.

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COZENS-HARDY L.J. There is one point on which I entirely agree with what has fallen from the other Lords Justices, viz., in thanking counsel on both sides for their able arguments in this extremely difficult case, but I regret that my agreement ceases there. I think that the decision of the Divisional Court was right, and that this bill of sale is void, because it includes something which was not a chattel. I propose to deal with the question simply as a matter of the construction of the bill of sale itself. If it be true that the deeds were actually handed over to the money-lender when this bill of sale was executed, it is apparent that the true transaction is not described on the face of the instrument, and that what was really intended was a security by deposit of title deeds; but I put that aside, and look at the question as one of construction. Treating it as a question of construction, in the first place this is a transaction of loan. It is an assignment of the things in the schedule by way of security for money lent. There is a power to sell after a certain number of days from the date of seizure or possession the property comprised in the schedule, and among the items in the schedule is the assignment of the lease and all the muniments of title referred to in the assignment; that is to say, the schedule is not dealing with a piece of parchment of no value, but it includes every single muniment of title. I have here a document under the hand of the owner of this leasehold property, and by that document he gives a licence to the money-lender to get possession of those deeds as security for the debt. If I give authority to a money-lender or to my bankers to take all my title deeds as security for a loan it would be difficult to deny that that would be regarded as a security on the land to which the deeds relate. It seems to me that it would be straining credulity in the present case to suppose that the intention of the parties was to treat these deeds as being mere pieces of parchment—as being anything else than that which they were described as being, viz., muniments of title—and the inference seems to me to be irresistible

that they were included in the schedule for the purpose of giving a security on the land. I ask myself this question: After this bill of sale had been executed and default had been made, could not the money-lender have required the execution of a legal mortgage and have claimed relief by sale or foreclosure in a Court of Equity? Speaking for myself I think he could, and if that be the true view then the bill is bad. In the Court below reliance was placed upon the case of *Cochrane v. Entwistle* (1), but I agree with what fell from Vaughan Williams L.J. on that point, and I do not think that that decision helps us in this case. That was a case almost too plain for argument, whereas this is a case of very great difficulty, and one which has caused me great doubt because I have the misfortune to differ from the other members of the Court. On the whole I think that the view taken by the Divisional Court was right, and that the appeal ought to be dismissed.

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*Appeal allowed.* (2)

Solicitors: *John Carnegie, Sismey & Cook, for Tolhurst, Lovell & Clinch, Gravesend.*

(1) 25 Q. B. D 116.

(2) See *Harrison v. Blackburn*, (1864) 17 C. B. (N.S.) 678.

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[IN THE COURT OF APPEAL.]

EVERALL *v.* BROWN.Aug. 2.

*County Court—Practice—Costs—Remitted Action—Discretion of Judge as to Costs—County Courts Act, 1888 (51 & 52 Vict. c. 43), ss. 65, 113.*

Sect. 65 of the County Courts Act, 1888, which provides that in the case of remitted actions "the costs of the parties in respect of proceedings subsequent to the order of the judge of the High Court shall be allowed according to the scale of costs for the time being in use in the county courts," does not take away the general discretionary power of the county court judge over the costs.

APPEAL from a decision of the Divisional Court, affirming the decision of the county court judge at Ludlow. (1)

The action was brought in the High Court to recover the sum of 40*l.*, the price of certain cows sold by the plaintiff to the defendant. Judgment was obtained under Order XIV. for 21*l.* 18*s.* 9*d.* and costs, and leave to defend was given as to the balance of 18*l.* 1*s.* 3*d.*, the action being remitted to the county court. In the county court the defendant recovered 8*l.* 1*s.* 3*d.* only on the claim, and the defendant recovered 7*l.* 8*s.* 9*d.* on a counter-claim, so that in the result a balance of 12*s.* 6*d.* only was due to the plaintiff.

In these circumstances the judge held that he had a discretion as to the costs of the proceedings in the county court, and in the exercise of his discretion awarded no costs. On appeal the Divisional Court (Lord Alverstone C.J., Kennedy and Ridley JJ.) affirmed the decision of the county court judge.

The plaintiff appealed.

*Bosanquet*, for the plaintiff. The Court has no discretion as to costs in the case of a remitted action. Sect. 113 of the County Courts Act, 1888, gives the Court a discretion only as to costs "not herein otherwise provided for," but s. 65, which deals with remitted actions, shews how the costs of such actions are to be paid. Therefore those costs are otherwise provided for within the meaning of s. 113 : *Wright v. Bull*. (2)

(1) [1905] 2 K. B. 196,

(2) [1900] 2 Q. B. 124

Assuming that the Court has a discretion, the judge in this case has exercised his discretion on a wrong principle—first, because for the purpose of determining the scale on which the costs are to be taxed he ought to have treated the proceedings in the High Court and in the county court as one: *White v. Headland's Patent Electric Storage Battery Co.* (1); and, secondly, because he ought to have entered separate judgments on the claim and the counter-claim. There being no question of misconduct in this case, prima facie the plaintiff having recovered 30*l.* in the action is entitled to the costs of the action on the B scale, and the defendant having recovered 7*l.* odd on the counter-claim is entitled to the costs of the counter-claim on the lower scale.

[VAUGHAN WILLIAMS L.J. In *Aston Tube Works, Ltd. v. Dumbell* (2) the Divisional Court dissented from the dicta of Ridley J. in *Wright v. Bull* (3), and Ridley J. was a party to the decision now under appeal.]

*Micklethwaite*, for the defendant.

VAUGHAN WILLIAMS L.J. (after consulting Romer and Cozens-Hardy L.JJ.). I think that we are all of opinion that the Divisional Court took the right view in *Aston Tube Works, Ltd. v. Dumbell* (2), and that the Divisional Court in this case were right in adopting that view.

*Appeal dismissed.*

Solicitors: *Jaques & Co., for C. B. Cottam, Ludlow; Chester, Broome & Griffithes, for Anderson, Sons & Tyrrell, Ludlow.*

(1) [1899] 1 Q. B. 507.

(2) [1904] 1 K. B. 535.

(3) [1900] 2 Q. B. 124.

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## MALKIN v. THE KING.

July 23  
Aug. 7.

*Licensing Acts—Compensation Fund—Liability to Contribute—“Existing On-Licence Renewed”—Provisional Licence—Licensing Act, 1904 (4 Edw. 7, c. 23), ss. 1, 3—Rules to the Licensing Act, 1904, rr. 41, 42.*

Licensing justices having on February 10, 1905, referred the renewal of an existing on-licence to quarter sessions under s. 1, sub-s. 2, of the Licensing Act, 1904, granted the renewal of the licence provisionally under r. 41 of the rules to the Act. The quarter sessions refused the renewal on May 8, subject to the payment of compensation. On October 10 the excise duties in respect of the provisional licence became due, but the Commissioners refused to accept them unless the amount due in respect of the contribution to the compensation fund were also paid:—

*Held*, that a provisional licence was not an “existing on-licence renewed” within the meaning of s. 3 of the Licensing Act, 1904, and that the holder of the provisional licence was not, therefore, bound to pay any contribution to the compensation fund.

SPECIAL case stated for the opinion of the Court in a petition of right.

Previously to and upon February 10, 1905, the suppliant was the holder of a licence duly authorizing him to sell ale, beer and porter at a house known by the sign of the Crooked Billet, which licence was an existing licence on that date.

At the general annual licensing sessions holden on that date, the suppliant duly made application for the renewal of the licence, but the justices on consideration of the application were of opinion that the question of the renewal required consideration on a ground other than those on which the renewal of an existing licence could be refused by them (namely, on the ground that the licence was not required), and referred the application to quarter sessions, together with their report thereon, in accordance with the provisions of s. 1 of the Licensing Act, 1904.

At the same time a renewal of the licence was granted to the suppliant in accordance with the terms of his application, but there was inserted in the licence a statement that the renewal was provisional, under r. 41 of the rules made under s. 6 of the Act.

On May 8, 1905, quarter sessions refused the renewal of the

licence subject to the payment of compensation in accordance with the provisions of the Act.

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No date was fixed for the payment of the compensation money, and the provisional licence granted to the suppliant was in force on October 10, 1905, on which day payment of the excise duties in respect of the provisional licence became due, and the suppliant was desirous of paying those duties on October 23, 1905, that being the day duly appointed for the purpose. Before that day, however, a demand note was served on the suppliant on behalf of the Commissioners of Inland Revenue for payment by him not only of the excise duties payable in respect of the provisional licence, but also of a sum of 6*l.* which was alleged to be payable as a charge imposed in respect of an "existing on-licence renewed" under the provisions of s. 3 of the Licensing Act, 1904.

The suppliant on October 23, 1905, gave notice that he was ready and willing to pay the excise duties, but the Commissioners refused to receive them or to issue the excise licence unless the said sum of 6*l.* was also paid. The suppliant accordingly paid that sum under protest.

Payment of the compensation money due to the suppliant was made on December 23, 1905, and in pursuance of r. 42 of the rules made under the Licensing Act, 1904, the provisional licence ceased to have effect as from the expiration of the seventh day afterwards.

The suppliant presented a petition of right for the return of the 6*l.* so paid under protest, and this case was stated for the opinion of the Court.

*Avory, K.C.* (*W. B. Hextall* with him), for the suppliant. The question is whether a licence provisionally renewed under r. 41 is an "existing on-licence renewed" within the meaning of s. 3 of the Licensing Act, 1904. Provisional renewal under the rule is not renewal as contemplated by the Act, and it was never intended that the holder of a provisionally renewed licence should be compelled to contribute to the compensation fund. Seven days after receiving the amount due to the licence holder out of the compensation fund the provisional licence



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automatically comes to an end by r. 42, and the provisional licence is therefore only a permission to carry on the business until the compensation money has been paid. The renewal of the suppliant's licence has been refused, and the provisional licence cannot be treated as a renewal. Statutes imposing a charge must be strictly construed: *Reg. v. Barclay*. (1)

*Sir J. Lawson Walton, A.-G., K.C. (W. Finlay with him),* for the Crown. The Licensing Act, 1904, is not an ordinary taxing Act, but is a means of raising a fund for compensating the holders of licences of which the renewal has been refused. This particular on-licence was an existing on-licence when the Act came into force on January 1, 1905, and thus became liable to contribute to the fund as an "existing on-licence renewed." It was renewed on February 10, subject to the power of the quarter sessions to refuse the renewal. Had the quarter sessions not chosen to act on the report of the licensing justices, the renewal, although expressed to be provisional, would have become an ordinary renewal, and so also if the provisional licence had gone on for the whole year it is plain that the suppliant ought to contribute to the compensation fund.

*Avory, K.C.*, replied.

*Cur. adv. vult.*

Aug. 7. WALTON J. This is a special case upon a petition of right praying that payment may be ordered to be made to the suppliant of the sum of 6*l.*, paid by or on behalf of the suppliant to the Commissioners of Inland Revenue, under the circumstances set out in the case. The material facts are these. The suppliant, before February 10, 1905, was the holder of a licence of a public-house known as the Crooked Billet. At the general annual licensing sessions held on February 10, 1905, the suppliant made application for the renewal of the licence, which was then an existing on-licence, but the justices, on the consideration by them in accordance with the Licensing Acts, 1828 and 1902, of the said application, were of opinion that the question of the renewal of the licence required consideration on a ground other than those on which the renewal of an existing on-licence could be refused by

(1) (1881) 8 Q. B. D. 306, at p. 312.

them, within the Licensing Act, 1904, s. 1, namely, upon the ground that the licence was not required, and they referred the matter of the said application for renewal to quarter sessions, together with their report thereon, under the provisions contained in that section. On May 8 following, the quarter sessions, having considered the question, refused the renewal subject to the payment of compensation in accordance with the terms of the Licensing Act, 1904. The licence held by the suppliant on February 10 expired on April 5, so that, unless something had been done, the licence would have come to an end on that day. But, although the justices did not renew the licence in the ordinary way, they did, on February 10, 1905, under the rules which have been made under the Licensing Act, 1904, grant a provisional renewal of the licence to the suppliant. No date was fixed by quarter sessions for the payment of the compensation money to the suppliant, and the provisional licence was in force on October 10, 1905, on which day payment of the excise duties in respect of the licence so provisionally in force became due. The suppliant was desirous to pay the same upon October 23, 1905, that being the day duly appointed for the purpose. Before October 23 a demand note was served upon the suppliant on behalf and in the name of the Commissioners of Inland Revenue for payment by him not only of the excise duties payable in respect of the provisional licence, but also of a sum of 6*l.* which was alleged by the Commissioners to be payable as a charge imposed in respect of an existing on-licence renewed under the provisions of the Licensing Act, 1904, s. 3. On October 23, 1905, notice was given to the Commissioners that the suppliant was ready and willing to pay the amount of the excise duties, but the Commissioners refused to receive the same or to issue the excise licence in respect of the provisional licence unless the said sum of 6*l.* were also paid, and thereupon the suppliant caused to be paid to the Commissioners the sum of 6*l.*, and at the same time caused to be served upon them notice in writing whereby he claimed that the said sum of 6*l.* so paid was paid by him under protest and without prejudice to his right to recover the same. The Commissioners have retained the sum of 6*l.*, and refuse to hand it over to the suppliant.

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The compensation money paid to the suppliant under the Act of 1904 was paid on December 23, 1905, and the provisional licence ceased to have any effect as from the seventh day afterwards, in pursuance of r. 42 made under the provisions of s. 6 of the Act of 1904. What the suppliant claims is that he is entitled to have repaid to him the sum of 6*l.* as being unlawfully demanded from him as a condition of the acceptance by the Commissioners of the excise duties and of the issuing to him of the excise licence, to which he claims he was entitled without payment being required from him of any sum as being a charge imposed in respect of an existing on-licence renewed under the provisions of the Licensing Act, 1904, s. 3.

The question is a question of some general importance as to the construction of s. 3, sub-s. 1, of the Licensing Act, 1904. The scheme of that Act is shortly as follows: With regard to existing licences, that is to say, licences existing on the day when the Act was passed—on August 15, 1904—certain provisions are made, and it is stated that licences then in existence, so long as they remain in existence, form a particular class of licence to which certain special privileges attach. Licences granted after August 15, 1904, stand on a different footing, to which I need not further refer. The licence in the present case was in existence on August 15, 1904. With regard to such a licence the Act of 1904, by s. 1, sub-s. 1, provided that “The power to refuse the renewal of an existing on-licence on any ground other than the ground that the licensed premises have been ill conducted, or are structurally deficient or structurally unsuitable, or grounds connected with the character or fitness of the proposed holder of the licence, or the ground that the renewal would be void, shall be vested in quarter sessions instead of the justices of the licensing district, but shall only be exercised on a reference from those justices, and on payment of compensation in accordance with this Act.” Then by sub-s. 2 it is provided that “Where the justices of a licensing district on the consideration by them, in accordance with the Licensing Acts, 1828 to 1902, of applications for the renewal of licences, are of opinion that the question of the renewal of any particular existing on-licences requires consideration on grounds other than those on which

the renewal of an existing on-licence can be refused by them "—referring to the 1st sub-section—"they shall refer the matter to quarter sessions, together with their report thereon"; and quarter sessions shall consider the report, and shall hear all proper parties, and may, "subject to the payment of compensation under this Act, refuse the renewal of any licence to which any such report relates." Then where the renewal is so refused compensation has to be paid in a certain way. That is provided for by s. 2. Then comes s. 3, sub-s. 1, the marginal note of which is "Financial Provisions." It provides the means by which a fund may be created out of which compensation for licences, the renewal of which has been refused under the provisions of s. 1, may be paid. By sub-s. 1 of s. 3, "Quarter sessions shall in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act impose, in respect of all existing on-licences renewed in respect of premises within their area, charges" at certain rates. Then sub-s. 2 provides that "Charges payable under this section in respect of any licence shall be levied and paid together with and as part of the duties on the corresponding excise licence, but a separate account shall be kept by the Commissioner of Inland Revenue of the amount produced by those charges." The only other sections of the Act to which I need refer are s. 6 and s. 9, sub-s. 4. By s. 6 "a Secretary of State may make rules for carrying into effect this Act, and may by those rules, amongst other things, (a) provide for the provisional renewal of licences which are included in reports of the justices of a licensing district under this Act." The important point is that the Act of 1904 in this section provides indirectly, that is, through the power given to the Secretary of State to make rules, for the provisional renewal of licences, the question of the renewal of which has been referred by the justices of the licensing district to quarter sessions under s. 1 of the Act. The other section is s. 9, sub-s. 4, which gives an interpretation of the expression "existing on-licence." For the purposes of the Act, "'existing on-licence' means an on-licence in force at the date of the passing of this Act, and includes a licence granted by way of renewal from time to time of a licence so in force, whether such

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licence continues to be held by the same person, or has been or may be transferred to any other person or persons." So that an existing on-licence means a licence which did exist on August 15, 1904, and which continues to exist by being renewed or transferred from time to time in the ordinary course of things. So long as it exists in that way, by renewal or transfer or both, and its life is, so to speak, unbroken, it belongs to the class to which I have referred—the existing on-licences, that is, on-licences which existed on August 15, 1904.

Now the rule which was made by the Secretary of State with regard to the provisional renewal of licences was this (1): "Where, under s. 1 of the Act, the renewal authority refer the question of the renewal of a licence to the compensation authority, the renewal authority shall grant the renewal of the licence in accordance with the terms of the application, but shall insert in the licence a statement as to the renewal of the licence being provisional."

The Act came into operation on January 1, 1905, and on some date in that month the quarter sessions having jurisdiction for the purposes of this case did impose a charge in respect of premises within their area under s. 3, and if that charge so imposed falls upon the premises of the suppliant, then the sum of 6*l.* was properly demanded by the Commissioners of Inland Revenue, and the suppliant is not entitled to have it repaid to him. If the charge imposed by the quarter sessions is a charge which does not fall on the premises in respect of which this question has arisen, then the 6*l.* was improperly demanded by the Commissioners of Inland Revenue, and the suppliant will be entitled to have it back. The question is whether the charge imposed by quarter sessions in January, 1905, is a charge which attaches to the suppliant's licence.

Now to what licences does the charge attach when made by quarter sessions? That depends on the meaning of the words of sub-s. 1 of s. 3: "Quarter sessions shall in each year . . . impose in respect of all existing on-licences renewed" the charges in question, and therefore the question is, Was this

(1) Rule 41 of the rules to the Licensing Act, 1904, made December 20, 1904.

provisional licence an existing on-licence renewed? It was an existing on-licence. It was a licence which was in existence on August 15, 1904, and had not been in any way lost; but the charge made in any year falls not absolutely on all licences which did exist on August 15, 1904, and have been renewed from time to time. If that had been the intention of the section, of course the words would have been "in respect of all existing on-licences" merely, but the charge falls upon "all existing on-licences renewed." One must remember, of course, that this section applies not merely to the year 1905, but applies from year to year as long as there are any licences still existing which were existing on August 15, 1904, and, therefore, what the section says is that in each year the quarter sessions shall make a charge for the purpose of providing the compensation fund, and such charge shall be imposed on all licences which existed on August 15, 1904, and still exist and which are renewed. Now that, I think, must mean, which are renewed in the year in respect of which the charge is made. The charge may be imposed in January; it may, perhaps, be imposed later on in the year. The year may run from October 10 to October 10, or from January 1 to January 1. It is not necessary to decide that for the purpose of this case, but in each year the Court of quarter sessions has to impose this charge, and for that year it falls upon all the existing licences within the area which existed on August 15, 1904, and have been renewed from time to time, and which are renewed in the year in respect of which the charge is made.

Now was this licence renewed in the year 1905? I will assume for the moment that the year referred to in s. 3, sub-s. 1, is from January 1 to January 1. Was this licence renewed in the year 1905? The answer, I am afraid, is that in one sense it was and in one sense it was not, and hence the difficulty of deciding this case. The renewal was undoubtedly refused by the quarter sessions on May 8. By sub-s. 2 what the quarter sessions could do was to refuse—in the very words of the statute—the renewal of the licence, and they did. Undoubtedly the renewal was refused, but then, on the other hand, it was equally undoubtedly granted,

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because on February 10, under r. 41, the justices of the licensing district did grant a renewal of the licence—they granted it in the terms of the application, which was an ordinary application for renewal, but they inserted in the licence so granted a statement as to the renewal of the licence being provisional. So that in that sense the licence was renewed, and if the quarter sessions had come to a different conclusion and had thought there were no proper grounds for refusing the renewal of the licence, then the provisional renewal would have become an absolute and unconditional renewal for twelve months. No further renewal would have had to be made, so that in a sense undoubtedly the licensing justices did renew the licence on February 10. But was that a renewal within the meaning of s. 3, sub-s. 1? It was certainly not an ordinary renewal. An ordinary renewal of a licence is a renewal of a licence from April 5 to April 5 for a year between those dates. This certainly was not a renewal of that kind. What was it? When one comes to analyze it and consider it carefully it was, no doubt, an absolute renewal until the quarter sessions dealt with the question referred to them with regard to this licence by the justices of the licensing district. Until May 8, it was, no doubt, an absolute renewal of the licence, and gave authority to the suppliant to sell intoxicating liquors on these premises until that date absolutely and unconditionally. If the quarter sessions did not interfere and did not refuse to renew the licence, then it became a renewal no doubt for the full year from April 5 to April 5, but if the quarter sessions did what they in fact did in this case, refuse the renewal, then the renewed licence did not cease to operate as an authority to sell, but it was a renewal of an authority to sell, not for the year until April 5, but only until seven days after the compensation money had been paid, because by r. 42 it is provided that “If the compensation authority refuse the renewal of any licence the renewal of which is provisional, . . . the licence shall cease to have effect as from the expiration of the seventh day after the date fixed under these rules for the payment of the compensation money.” So that, in fact, this licence never was renewed in the ordinary sense for the

twelve months from April 5 to April 5. Nothing was granted except a provisional licence, and a licence for a period which was conditional upon the date when the compensation money was paid—it might be much less than a year; it might possibly extend for the whole year; but it was entirely conditional and provisional.

Now was that a renewal within the meaning of s. 3, sub-s. 1? I have come to the conclusion that it was not, and that this sub-section means that the charge is to fall each year upon all licences which are existing in that year, and which in that year are renewed. I think by “renewed” is meant, renewed in the ordinary sense—not licences the renewal of which is refused; and that being so, I think the suppliant is entitled to succeed, and that there ought to be judgment for him.

*Judgment accordingly.*

Solicitors: *Pitman & Sons, for Chambers & Son, Sheffield; The Solicitor of Inland Revenue.*

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GUARDIANS OF PONTYPOOL *v.* BUCK.

Oct. 31. *Poor Law—Maintenance of Relations—Liability of Married Daughter—The Poor Relief Act, 1601 (43 Eliz. c. 2), s. 7—Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 1, sub-s. 2.*

A married woman cannot be ordered to maintain her father under the Poor Law Acts, even though she has separate estate and is of sufficient ability to maintain him.

CASE stated by justices of Monmouthshire.

A complaint was preferred on behalf of the guardians of Pontypool against the respondent Hannah Buck, charging that one George Mitchell, on February 15, 1906, being a poor, old and impotent person, residing in the parish of Abersychan in the Pontypool union, became chargeable to the common fund of the union and that the respondent was the daughter of George Mitchell and was of sufficient ability to maintain him. At the hearing it was proved and admitted that George Mitchell, the father of the respondent, was destitute and in receipt of relief from the guardians, that the respondent was the wife of David Buck, who was living, and that she was possessed of property rated at a gross value of 92*l.* 5*s.*

The justices were of opinion that as the respondent was a feme covert, they had no jurisdiction to make a maintenance order against her, and they accordingly dismissed the complaint.

The guardians appealed.

*Macmorran, K.C.*, and *R. Cunningham Glen*, for the appellants. The respondent comes within the precise terms of 43 Eliz. c. 2, s. 7 (1), which provides that "the children of every . . . poor person not able to work, being of a sufficient ability shall at their own charges relieve and maintain every such poor person." It is true that previously to the passing of the Married Women's Property Act, 1882, an order could not have been made under the 43 Eliz. against a married woman to maintain her father, even though she had separate estate and was of sufficient ability, upon the ground that her personality was merged in that of her

husband. The Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), rendered a married woman, having separate estate, liable by s. 13 for the maintenance of her husband, and by s. 14 for that of her children. But that Act did not put a married woman generally in the position of a feme sole. The Married Women's Property Act, 1882, which repealed the Act of 1870, went further and made a married woman with separate estate liable for the maintenance of her husband (s. 20), children and grandchildren (s. 21); the extension to grandchildren being in consequence of the decision in *Coleman v. Overseers of Birmingham* (1), that the word "children" in the Act of 1870 did not include "grandchildren." But the express provision in the Act of 1882, that a married woman should be liable to support those three classes of relations was superfluous, for s. 1, sub-s. 2, enacts that "A married woman shall be capable of . . . being sued . . . in all respects as if she were a feme sole"—thereby doing away with the only ground upon which her liability was excluded under the statute of Elizabeth. *Cessante ratione cessat et ipsa lex*. As she is no longer one person with her husband, she can, where she is of sufficient ability, be ordered by justices to maintain any of her relations of the classes mentioned in s. 7 of that Act, including her father.

*Avory, K.C.*, and *S. G. Lushington*, for the respondent. Sect. 1, sub-s. 2, of the Act of 1882 speaks only of a married woman being "sued." But that is an inappropriate term to apply to proceedings by complaint before justices. It was never intended by that section to render her liable to be proceeded against under the Poor Law Acts. It cannot be assumed that the Legislature intentionally provided in ss. 20 and 21 express enactments which, on the appellants' contention, they must have known to be superfluous.

LORD ALVERSTONE C.J. There can be no doubt about this point. Previously to the passing of the Married Women's Property Act, 1870, a married woman during the lifetime of her husband was not liable under the statute of Elizabeth to support any of her relations at all. The Act of 1870 rendered a married

(1) (1881) 6 Q. B. D. 615.

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woman who was possessed of separate property liable for the maintenance of her husband, and also of her children to the same extent that a widow was so liable. And the Married Women's Property Act, 1882, re-enacted a married woman's liability to maintain her husband and children and extended that liability to the case of her grandchildren. You have there an Act of Parliament expressly providing for her liability in the case of three classes of her relations. It is silent as to her obligation to maintain her parents. I can see nothing in that Act suggesting that it was intended to impose such an obligation. On the contrary, the express mention of her liability to maintain certain persons excludes the notion of her liability to maintain others. The appeal must be dismissed.

RIDLEY J. I am of the same opinion. I do not think that s. 1, sub-s. 2, of the Act of 1882 can be construed as imposing a liability upon a married woman to maintain any of her relations under the poor law.

DARLING J. I agree.

*Appeal dismissed.*

Solicitors for appellants: *E. & J. Mote, for Watkins & Co., Pontypool.*

Solicitor for respondent: *F. Kinch, for Lyndon, Moore & Cooper, Newport (Mon.).*

J. F. C.

WADDLE, APPELLANT *v.* SUNDERLAND UNION,  
RESPONDENTS.

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Oct. 25, 26.

*Poor-rate—Rateable Value—Deduction—Necessary Expense to command Rent—Licensed Premises—Compensation Fund—Charge—Licensing Act, 1904 (4 Edw. 7, c. 23), s. 3—Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1.*

In estimating the rateable value of fully licensed premises the amount of the annual charge imposed in respect of the premises under s. 3 of the Licensing Act, 1904, cannot be deducted, the charge being neither the cost of insurance nor an expense necessary to maintain the premises in a state to command the rent thereof within s. 1 of the Parochial Assessments Act, 1836.

CASE stated by quarter sessions for the county of Durham in an appeal by the appellant against a rate made for the relief of the poor by the overseers of the parish of Sunderland on October 27, 1905.

The facts stated in the case were as follows :—

The appellant was the owner, licence-holder and occupier of certain fully licensed premises known as the Central Hotel, situated at 32, Bridge Street, Sunderland. By the rate the appellant was assessed as the occupier of the Central Hotel upon a gross value of 750*l.* and a rateable value of 625*l.*

The appellant appealed against the rate at quarter sessions on the following grounds : That in addition to the deduction of one-sixth heretofore deducted by the committee for repairs, insurance and other expenses necessary to maintain the premises in a state to command the rent at which the same might reasonably be expected to let from year to year, there should also be deducted the amount charged thereon under s. 3 of the Licensing Act, 1904, for the year 1905.

By the material portions of s. 3 of the Licensing Act, 1904, it is provided that—

“(1.) Quarter sessions shall in each year, unless they certify to the Secretary of State that it is unnecessary to do so in any year, for the purposes of this Act impose, in respect of all existing on licences renewed in respect of premises within their area,



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“(2.) Charges payable under this section in respect of any licence shall be levied and paid together with and as part of the duties on the corresponding excise licence.

“(3.) Such deductions from rent as are set out in the Second Schedule to this Act may, notwithstanding any agreement to the contrary, be made by any licence holder who pays a charge under this section and also by any person from whose rent a deduction is made in respect of the payment of such a charge.”

Under the Second Schedule a person, whose unexpired term does not exceed one year, may deduct a sum equal to 100 per cent. of the charge.

Sunderland being a county borough, the compensation authority under the Licensing Act, 1904, is by virtue of s. 8, sub-s. 2, of that Act “the whole body of justices acting in and for the borough.”

The licence of the Central Hotel was renewed for the year 1905, and the maximum charge of 80*l.* under s. 3 of the Licensing Act, 1904, was imposed upon the appellant in respect thereof, which charge had been levied and paid.

It was admitted by the respondents that it would probably be necessary in Sunderland to impose for some years to come the maximum charge under the Act, and that, therefore, for the purpose of this case 80*l.* might be taken to be the probable average annual amount of that charge.

It was admitted by the appellant that the duty on the excise licence never has been treated as within the words of s. 1 of the Parochial Assessments Act, 1836. (1)

(1) The Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96), s. 1: “Be it enacted that . . . no rate for the relief of the poor in England and Wales shall be allowed by any justices, or be of any force, which shall not be made upon an estimate of the net annual value of the several hereditaments rated thereunto; that is to say, of the rent at which the same

might reasonably be expected to let from year to year, free of all usual tenants’ rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average annual cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent; . . .”

It was contended for the appellant that the payment of the charge was a condition of obtaining the excise licence; that, as the licence was taken into consideration in estimating the gross value of licensed premises, this charge came within the words of s. 1 of the Act of 1836 as being an expense necessary to maintain the hereditaments in a state to command the rent at which they might be reasonably expected to let from year to year; that, therefore, the probable average annual amount of this charge was by virtue of the provisions of s. 1 a deduction to be made from the gross value in order to arrive at the rateable value of these hereditaments.

It was contended for the respondents that the ability of the hereditaments to command the aforesaid rent as licensed premises depended, not on the taking out of the excise licence, but on the grant of the justices' certificate; that this charge, being levied and paid as part of the excise licence duty, was not an expense within s. 1 of the Act of 1836, but was an ordinary trade expense necessary to the exercise of the privilege acquired by the justices' certificate, and did not constitute a deduction directed by s. 1 to be made from the gross value; that the excise duty never had been treated as an expense necessary to maintain the hereditaments in a state to command the rent, or other than as an ordinary trade expense; that expenses necessary to maintain the hereditaments in a state to command the rent were expenses ejusdem generis with repairs and fire insurance, and were expenses for the maintenance of the premises themselves which alone were capable of being maintained; and that the charges levied under the provisions of the Licensing Act, 1904, were not for maintenance but as an insurance against loss resulting from destruction.

The quarter sessions rejected the appellant's contention, and dismissed the appeal, subject to this case.

The question for the opinion of the Court was whether the quarter sessions were right in holding that this charge was not such an expense as to constitute a deduction from the gross value within s. 1 of the Parochial Assessments Act, 1836.

*Danckwerts, K.C., and Mitchell-Innes*, for the appellant. The quarter sessions were wrong in not allowing this deduction. The

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additional value given to the premises by the issue of an excise licence is included in the rateable value, and unless the compensation charge imposed by s. 3 of the Licensing Act, 1904, is paid, the excise licence will not be issued. The compensation charge is therefore an expense necessary to maintain the premises in a state to command the rent, and comes directly within the language of s. 1 of the Parochial Assessments Act, 1836. It also comes within the word "insurance" in that section, for the payment of the charge may be regarded as an insurance against the destruction of part of the value of the premises or as an insurance that the premises will possess during the year in question the value at which they have been rated. It is admitted that it has not hitherto been the practice to treat the duty on the excise licence as within s. 1, but it is not admitted that the occupier would not in law be entitled to claim a deduction of that duty. [*Newport Union v. Stead* (1), *Humphreys v. Blyther* (2), *Reg. v. Smith* (3), and *Reg. v. Gainsborough Union* (4), were referred to.]

*Tindal Atkinson, K.C.*, and *E. Shortt*, for the respondents. The deductions authorized by s. 1 of the Act of 1836 in respect of repairs and insurance are clearly matters referring only to the structure of the premises and not to the particular business carried on therein, and the words "other expenses" must be read as referring only to matters ejusdem generis with repairs or insurance. The compensation levy is not an expense of maintaining the premises or the licence, but is a compensation for or an insurance against the loss of the licence. It may be that this payment can be taken into consideration in ascertaining the gross annual value of the premises, but it is clearly not an expense which can be deducted under the Act of 1836. It is not correct to say that the excise licence is not issued until the compensation charge has been paid. The issue of the excise is a mere formality; that which gives the value to the premises is the justices' certificate.

*Danckwerts, K.C.*, replied.

(1) *Ante*, 147.

3rd ed., p. 474.

(2) (1878) Reported in *Brown's Copyhold Enfranchisement Acts*,

(3) (1885) 55 L. J. (M.C.) 49.

(4) (1871) L. R. 7 Q. B. 64,

LORD ALVERSTONE C.J. The question raised in this case is whether the appellant, who is an occupier of licensed premises, in arriving at the net annual value of the premises for the purpose of the poor rate, is entitled to deduct the amount of the charge annually imposed on the premises under s. 3 of the Licensing Act, 1904. The answer to the question depends on whether the deduction is one which comes fairly within s. 1 of the Parochial Assessments Act, 1836. [His Lordship read the section.] The argument for the appellant is very ingenious. It is said that the value of the premises is enhanced by the licence, and it has been the recognized practice for many years to take that additional value into consideration in estimating the rateable value. The Licensing Act, 1904, provides for the reduction of licences and for compensation to be paid by means of a charge imposed upon existing licences, and it is contended, therefore, that the amount of that charge is within the language of s. 1 as being either insurance or an expense necessary to maintain the premises in a state to command the additional rent which the possession of the licence gives them. If it could fairly be said that this was a sum of money paid in order to maintain the licence of this particular hereditament or of the class of licensed premises of which the appellant's was one, there would, I think, be something to be said for the appellant's contention, for the case would then come very near the cases to which reference has been made where special rates were made for maintaining drainage works or a fishery or preventing incursions of the sea. But I have come to the conclusion that the charge imposed by the Licensing Act, 1904, in respect of the appellant's premises is too remote, and cannot fairly be brought within the language of s. 1 of the Act of 1836. As the maximum scale of charges is made to vary with the value of premises, it may be said that the charge has some relation to the annual value of the premises, but one must, in my opinion, look at the substance of the matter. The compensation fund is not raised for this particular licence or the whole class of licences, but in order to form a fund out of which the owners and occupiers of premises of which the licences are not renewed may be paid compensation. It is possible that at some future date the appellant may be one

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of the persons who will receive a share of the fund; but the case is, in my opinion, very far removed from the cases of money paid for insurance or to maintain the premises in a condition to command the rent within s. 1 of the Act of 1836. The appellant's claim is open to the objection pointed out in *Newport Union v. Stead* (1) that the deduction which the appellant seeks to make is not in respect of an expense necessary to maintain these particular premises, but one connected with other properties as well. I do not attach much importance to the fact that the money has to be paid with the duty on the excise licence. It is admitted that it has not been the practice to deduct the duty on the excise licence, and, therefore, it cannot be said that the Legislature in imposing this charge has put it in the same category as a payment which was known to come within the statutory deductions.

For these reasons I am of opinion that the appeal fails.

RIPLEY J. I agree. It is perhaps difficult to define what the charge imposed by s. 3 of the Licensing Act, 1904, really is, but I am clearly of opinion that it is not an expense which can be deducted under s. 1 of the Act of 1836. I do not think that it is, strictly speaking, a charge. The Act uses that term, it is true; but it is an assessment, something in the nature of the old poll tax, made on particular persons for a particular purpose. The object of the Act of 1836 was to provide a method of ascertaining the net annual value, and it authorized the deduction of the cost of repairs and insurance "and other expenses, if any, necessary to maintain" the premises in a state to command the rent. Repairs and insurance are clearly matters which have relation to the particular hereditaments in question, and I think it will be found that in all cases where a deduction has been allowed it has been in respect of some expense which has relation to the particular premises. I cannot see how this charge, whatever it may really be, can be said to have that relation to these premises. The charge is not imposed for the purpose of maintaining these particular premises, but for another purpose altogether, namely, to carry out a scheme for the reduction in the number of licensed houses.

(1) *Ante*, 147.

DARLING J. I am of the same opinion. The appellant seeks to obtain an allowance or deduction in respect of a possible contribution, which will not necessarily occur every year, towards the compensation fund created by the Licensing Act, 1904. If the deduction can be made, it must be in consequence of the language of s. 1 of the Parochial Assessments Act, 1836. It is plain that when the Act of 1836 was passed this particular deduction was not contemplated, because the compensation fund did not come into existence until 1904; but it may be that the language of the section is wide enough to cover it, and if there are any words sufficiently wide they must be the words "other expenses, if any, necessary to maintain" the premises "in a state to command such rent." Therefore the expense must be something necessary to maintain the hereditament, not to maintain something connected with the hereditament. Further, it must be an expense necessary to maintain the hereditament "in a state to command such rent." The word "state" does not, in my opinion, mean such a thing as a permission to trade in a particular commodity in the hereditament, and the "state" of the hereditament cannot be said to be altered by the lapse of the licence. The hereditament remains in the same "state" whether there is a licence or not, though it is of course obvious that the premises would command a higher rent when licensed. In my opinion the language of the section is not sufficiently wide to entitle the appellant to make this deduction.

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*Appeal dismissed.*

Solicitors for appellant: *Godden, Son & Holme, for Longden Mann & Longden, Sunderland.*

Solicitors for respondents: *Johnson, Weatherall & Sturt, for J. G. Marshall, Sunderland.*

F. O. R.





















